CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19[illegible]47

No. [illegible]

THE UNITED STATES OF AMERICA, PETITIONER

vs.

MICHAEL DI RE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 2, 1947
CERTIORARI GRANTED MAY 26, 1947

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1193

THE UNITED STATES OF AMERICA, PETITIONER

vs.

MICHAEL DI RE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

	Original	Print
Proceedings in U. S. C. C. A., Second Circuit	1	1
Statement under Rule XIII	1	1
Record from D. C. U. S., Western District of New York	2	1
Docket entries	2	1
Indictment	4	2
Bill of exceptions	5	3
Caption and appearances	5	3
Witnesses for Government:		
Gross, Arthur A.:		
Direct examination	6	4
Cross-examination	12	8
Redirect examination	22	14
O'Donnell, Edmund M.:		
Direct examination	22	15
Cross-examination	25	16
Redirect examination	28	18
Klenk, Harry G.:		
Called	29	19
Direct examination	32	21
Cross-examination	34	22
Lipsher, Joseph R.:		
Direct examination	37	24
Cross-examination	40	26
Redirect examination	47	31
Defendant's motion to suppress evidence and exhibits, etc	29	19

	Original	Print
Record from D. C. U. S.—Continued		
Bill of exceptions—Continued		
Renewal of defendant's motion, etc	48	31
Witnesses for defendant:		
Gross, Arthur A.: Direct examination	48	31
DiRe, Mary:		
Direct examination	49	32
Cross-examination	51	33
Renewal of defendant's motion, etc	51	33
Charge of the court	52	34
Proceedings of August 14, 1944—Renewal of defendant's motion	56	37
Notice of appeal	57	37
Assignment of errors	59	38
Stipulation extending time to file record	60	39
Stipulation settling bill of exceptions	61	39
Order settling bill of exceptions	62	40
Stipulation as to record	62	40
Stipulation as to exhibits	62	40
Clerk's certificate [omitted in printing]	63	40
Opinion, Hand, J	64	41
Dissenting opinion, Clark, J	67	44
Judgment	70	47
Motion for leave to file petition for rehearing out of time	71	48
Orders denying motion for leave to file petition for rehearing out of time	72	49
Clerk's certificate [omitted in printing]	73	49
Order extending time for filing petition for certiorari	73	50
Order allowing certiorari	74	50

In the United States Circuit Court of Appeals for the Second Circuit

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

MICHAEL DIRE, DEFENDANT-APPELLANT

Statement under rule XIII

The indictment herein was filed in the United States District Court for the Western District of New York on May 2, 1944, against Michael DiRe, charging him with possession of a quantity of counterfeit gasoline rationing coupons, in violation of Section 1394.8178 of Ration Order No. 5C, issued by the Office of Price Administration, in violation of Sec. 301 the Second War Powers Act of 1942 and the Amendments, Regulations, Orders, and Schedules promulgated pursuant to such Act.

The defendant was arraigned on July 3, 1944, and pleaded not guilty.

The case was tried before the Hon. John Knight, United States District Judge for the Western District of New York, and a jury, in Jamestown, N. Y., on August 8, 1944. On that date the jury found the defendant guilty as charged in the indictment.

On August 8, 1944, the defendant's motion to set aside the
2 verdict was denied. On August 14, 1944, further motions to set aside the verdict and in arrest of judgment were denied.

On August 14, 1944, the defendant was sentenced to one year in an institution to be designated, and to pay a fine of One ($1.00) Dollar, payment of fine suspended.

On August 14, 1944, notice of appeal was filed, and the defendant was released on bail pending argument and decision of this appeal.

In United States District Court, Western District of New York

Crim. 3746–C.

UNITED STATES OF AMERICA

vs.

MICHAEL J. DIRE, ALIAS MIKE J. DIRE

Docket entries

Possession of counterfeited gasoline ration coupons, in violation of Section 301 of the 2nd War Powers Act of 1942.
Offense: April 14, 1944—1 count $5.00.
6–23–44—Filed indictment.
6–23–44—Initial docket report made up.

6- 2-44—Filed Comm. Trans.
6- 3-44—Filed Bond.
7- 3-44—Defendant duly arraigned in open court entered a plea of not guilty.
7-22-44—Filed subpoena with Marshal's return of service on Reid, Manning, Neff, O'Brien.
3 8-2-44—Filed praecipe for subpoena on Harold N. Reid. Issued subpoena.
8- 4-44—Filed subpoena on Harold N. Reid with return of service.
7-26-44—Filed subpoena with Marshal's return of service on O'Donnell, Gross & Collins.
8- 8-44—Case moved for trial. Trial before judge and jury. Motions to dismiss denied. Jury returns verdict of guilty as charged. Motion to set aside verdict denied. Sent. deferred to Aug. 14, 1944 at Bflo.
8-14-44—Filed notice of appeal and appeal bond 5.00
Motion to set aside verdict denied. Defendant appears for sentence whereupon he is sentenced to be confined for one (1) year in an institution to be designated and to pay a fine of $1.00, payment of fine suspended—Knight, D. J.
8-14-44—Judgment entered and filed.
8-14-44—Commitment issued.
8-14-44—Final docket report made up.

CLOSED

8-17-44—Filed order ratifying and confirming oral direction of Court made 8-3-44 for procuring physical examination of defendant.

UNITED STATES OF AMERICA,
Western District of New York, ss:

I, May C. Sickmon, Clerk of the United States District Court in and for the Western District of New York, do hereby certify that the annexed and foregoing is a true and full copy of the original docket entries to date now remaining among the records of the said Court in my office.

4 In testimony whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Buffalo, New York, this 26th day of October A. D. 1944.

[SEAL]

MAY C. SICKMON,
Clerk.
ZENIA J. S. BRYON,
Deputy Clerk.

In District Court of the United States, Western District of New York

Indictment

At a stated term of the District Court of the United States of America for the Western District of New York, begun and held at the Courthouse in the City of Rochester within and for the District aforesaid, on the second Tuesday of May in the year of our Lord one thousand nine hundred and forty-four, before the Honorable Harold P. Burke, Judge of the said Court.

WESTERN DISTRICT OF NEW YORK, *ss:*

The Grand Jurors of the United States of America, within and for the District aforesaid, then and there sworn and charged to inquire for the said United States of America and for the body of said district, do upon their oaths, present that Michael J. DiRe, alias Mike J. DiRe now or late of Buffalo, in the County of Erie with force and arms, etc., to wit, at Buffalo, in the County of Erie, in the said Western District of New York, and within
5 the jurisdiction of this Court, heretofore, to wit, on or about the 14th day of April 1944 did then and there, knowingly, wrongfully, unlawfully and wilfully, have in his possession a quantity of counterfeited gasoline rationing coupons, which said possession was in violation of the provisions of Section 1394.8178 of Ration Order No. 5C, issued by the Office of Price Administration, pursuant to the provisions of the Second War Powers Act of 1942; all of which is contrary to the form of the statute of the United States of America, in such case made and provided, to wit, Section 301 of the Second War Powers Act of 1942 and the Amendments, Regulations, Orders, and Schedules made and promulgated in pursuance thereof, and against the peace and dignity of the said United States of America.

GEORGE L. GROBE,
Attorney of the United States in and for the Western District of New York.

In United States District Court, Western District of New York

Case No. 3746–C

UNITED STATES OF AMERICA

vs.

MICHAEL DIRE, DEFENDANT

Bill of exceptions

Trial before Honorable John Knight, United States District Judge for the Western District of New York, at
6 Jamestown, New York, Tuesday, August 8th, 1944, at 10 A. M.

Appearances

Honorable George L. Grobe, United States Attorney for the Western District of New York, by Eugene J. Donnelly, Esq., Assistant United States Attorney, appearing for the Government.
Charles Joseph McDonough, Esq., Attorney for the Defendant.

PROCEEDINGS

(Mr. Donnelly made a short opening address to the jury.)
(Mr. McDonough made a short opening address to the jury.)

ARTHUR A. GROSS, a witness called by and on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. DONNELLY:

Q. Mr. Gross, you a member of the Buffalo Police Department?—A. I am.

Q. In what capacity do you serve in the Police Department?—A. Acting detective in the Detective Bureau.

Q. How long have you been a member of the Buffalo Police Department?—A. 14 years next month.

Q. How long a detective?—A. Acting detective about 7 years.

Q. Do you know the defendant, Michael DiRe?—A. I do.

Q. Will you tell the Court and jury where you first saw him?—A. On April 14th, 1944, I saw Michael DiRe parked
7 in an automobile on Arkansas Street, and the machine was occupied by two other men.

The COURT. By him and two other men?

The WITNESS. Yes.

Q. Now, Arkansas Street is a street in the City of Buffalo, New York?—A. That is right.

Q. And runs in what direction?—A. I could not say as to the direction, but it was about 100 feet from Barton Street.

Q. Arkansas Street parallels Niagara Street?—A. I believe it does.

Q. And the nearest main artery to it is Niagara?—A. Yes. There is Ferry, too.

Q. Tell us what you observed and what you did.—A. This car was parked at the curb, and was occupied by DiRe, who was sitting on the right, and a man by the name of Buttitta, who was sitting at the wheel. There was a man named Reed, who was sitting in the rear seat.

Q. The defendant, Mr. DiRe, was seated next to the driver, Mr. Buttitta, and in the back seat was Mr. Reed?—A. Yes.

Q. Did you get closer to the car?—A. This car was parked at the curb, and we got out and approached the car. I went to the right side, and Mr. Neff and Mr. O'Connell went to the left side of the car. The right door did not open, and I had looked in and seen the man in the rear seat, named Reed. He had two coupons in his hand, and he was asked where he got these coupons. He s'id he got them from Buttitta. They were 100 gallon inventory coupons.

Q. Have you those with you?—A. I have not got them. I believe Mr. O'Donnell has them.

Q. What else did you do at that time?—A. I questioned them and the ownership of the car and driving license, and so forth. Buttitta did not have it in his possession at the time we took them in custody and ordered them into headquarters.

The COURT. Buttitta was the one driving the car?

The WITNESS. He was behind the wheel.

The COURT. He had no license?

The WITNESS. He had no operator's license.

By Mr. DONNELLY:

Q. Who did you take to headquarters?—A. Michael DiRe rode with Donald Neff, and the others in the police car.

Q. You took him to police headquarters?—A. Yes.

Q. What did you do at police headquarters?—A. We arrived at police headquarters and questioned these men, and Reed had made a statement, that he got the coupons from Buttitta. They were asked to lay their possessions out on the table, and we fou. gas coupons on DiRe—200 inventory coupons.

Q. Have you got those with you?—A. I believe Mr. O'Donnell has those also.

Q. Mr. O'Donnell was present with you at that time?—A. Yes.

Q. You asked him to put the contents of his pockets on the desk?—A. Yes.

The COURT. What became of the coupons that Reed had?

The WITNESS. Those were separate. Upon being requested to place the articles and be searched, we found two coupons, and a one A coupon and a one C, and several fuel oil coupons, and he said he received these coupons, he found them in the street some time previous.

9 The COURT. These were on DiRe?

The WITNESS. Yes.

By Mr. DONNELLY:

Q. Mr. DiRe told you he found them in the street?—A. Yes.

Q. I show you two gasoline inventory coupons, and ask if you got them at that time?—A. I did.

Q. They were initials on there?—A. Yes, sir.

Q. Are they the two coupons which Mr. DiRe, the Defendant, disgorged from his pockets at Police Headquarters onto the desk?—A. Yes.

Mr. DONNELLY. I offer in evidence two 10-gallon inventory gasoline coupons. They are joined together.

Mr. McDONOUGH. I would like to request a preliminary examination of the officer as to the circumstances under which these were originally taken from the defendant.

The COURT. Were these men under arrest?

The WITNESS. They were, Your Honor. They were in custody.

The COURT. You question the right to search?

Mr. McDONOUGH. I do. That is why I made my request for a preliminary examination as to the circumstances of the arrest, before the coupons are allowed in evidence.

The COURT. He says they were under arrest.

Mr. McDONOUGH. That is what I would like to ask him about.

Mr. DONNELLY. I believe, Your Honor, that a preliminary examination would be out of order at this time, until we have the whole of the witness' testimony. He has only begun.

10 The COURT. I will deny the request.

Mr. McDONOUGH. I do not think I am foreclosed from that.

The COURT. I have denied the request.

Mr. McDONOUGH. I will ask Your Honor to reserve decision on the offer of the coupons in evidence until my cross-examination.

Mr. DONNELLY. I offer them for identification and ask that they be marked "Government's Exhibit No. 1" for identification.

(Thereupon the coupons above referred to were marked as "Government's Exhibit No. 1" for identification.)

By Mr. DONNELLY:

Q. What was the actual time of arrest on Arkansas Street?—A. About 6 P. M., April 14th.

Q. And at what time in the police station, did the defendant disgorge the Defendant's Exhibit 1 for identification?—A. About 6:30.

Q. When did you next see the defendant, Mr. DiRe, in the police station?—A. In the police station.

Q. At about what time?—A. He was being questioned, and about 8 P. M., he was being booked, and he was searched, and upon searching him, he said he was a little ticklish. We gave them a thorough search before we put them in the cell block.

The COURT. You claim you found these coupons prior to then?

By Mr. DONNELLY:

Q. You proceeded to search him again?—A. Yes.

Q. Preliminary to putting him in the cell block.—A. Yes.

11 Q. What did you do at that time?—A. Well, whenever we got near his privates, he said "Do not do that. I am ticklish."

Q. What did you do?—A. I pulled his shirt out, and he had a jacket on, and opened the front of his trousers, and between that shirt and his underwear, there was an envelope concealed on his person. There were figures in pencil "100" on the outside.

Q. Have you got that with you?—A. I have.

Q. Did you open that envelope?—A. I did.

Q. And examined the contents?—A. I did. When I found this, he said "I'm gone."

Q. Is this envelope and the contents the same as you took from his person?—A. They appear to be the same. Yes, they are.

Q. You have initialed them and identified them?—A. Yes.

Mr. DONNELLY. I offer these likewise for identification, and ask they be marked "Government's Exhibit No. 2" for identification, both the envelope and the contents.

(Thereupon the envelope and contents above referred to were marked as "Government's Exhibit No. 2" for identification.)

By Mr. DONNELLY:

Q. Did you count these?—A. There were 100 inventory coupons, each good for 100 gallons.

Q. Now, did you see him any further that evening?—A. Yes; we found these after being booked.

Q. I cannot hear you.—A. After being booked we informed him—or rather, we questioned him further as to the possession of these coupons. He had said he got them off of a man named Joe at an address near Andy's place.

12 Q. What is Andy's place?—A. It is a tavern located at 20 Genesee Street, and the Lower Terrace.

Q. Did he say anything else?—A. He said he did not know the man's name. He said he was just keeping them for him.

Q. Did he offer to tell you where Joe was?—A. He said he did not know. He said he was from out of town, and he did not know.

Q. When did you next see Mr. DiRe?—A. I saw him at the hearing.

Q. Did you see him at any later date?—A. Yes; at the investigation of crime in the City of Buffalo at a later date.

Q. And what did he say to you?—A. He made no admissions about it.

Mr. McDonough. I object to that as incompetent, irrelevant, and immaterial. I cannot anticipate what the Government may be getting into. I object to any testimony except the alleged possession of these coupons.

The Court. What did he say?

The Witness. He said he did not know. It was the same story, that it was Joe.

Mr. Donnelly. You may ask.

Cross-examination by Mr. McDonough:

Q. Officer Gross, did you know the other occupants of the car before you walked up to Buttitta's car on Arkansas Street that day?—A. I had never seen Reed, but I had known Buttitta by reputation.

Q. You had followed the car?—A. Yes.

Q. You had the license number?—A. Yes, sir.

Q. You knew it was Buttitta's car?—A. Yes, sir.

Q. You had been following Buttitta's car?—A. Yes.

13 Q. Up to that time, did you know who the other occupants of the car, outside of Buttitta?—A. I did not know them by name.

Q. From where did you follow the car?—A. We got the car at the stop at West Ferry and Niagara Streets, and about five minutes later we located it standing on Arkansas.

Q. Did you know that Reed had an appointment to meet Buttitta at the Deco stand? Some one in that party knew that Mr. Reed was supposed to meet Mr. Buttitta, the owner of the automobile, at the Deco stand?—A. Yes.

Q. Reed told you?—A. He did not tell me.

Q. He told somebody in that party; in your party?—A. I do not know. We had information this man was peddling gasoline coupons.

Q. You did find that Buttitta was going to meet Reed in connection with these gasoline coupons?—A. Yes.

Q. At the time you did not know who was in the car other than Buttitta?—A. No.

Q. You followed the car over on Arkansas Street?—A. It was parked at the curb, and we had stopped the car because it was easy to see the truck.

Q. Who was in the truck?—A. There as nobody in the truck.

Q. Where was the truck parked?—A. Right directly behind this Plymouth car.

Q. When you walked up to Buttitta's car and you say Buttitta, the man who had the appointment with Reed, was behind the wheel, and DiRe was sitting next to him in the front seat? Is Mr. Reed here in court today?—A. Yes.

Q. This gentleman next to the jury?—A. Yes.

Q. You went to the left or right-hand door.—A. The right side.

14 Q. And the minute you opened the door, you saw this gentleman, Reed, two coupons?—A. I could not open the door, I do not know whether the door on the other side was opened by the investigators, or Mr. Buttitta himself.

Q. Did you look through the window?—A. I did.

Q. And you saw Mr. Reed with what looked to be gasoline coupons?—A. Yes.

Q. Did you then open that door?—A. I could not open the door.

Q. Somebody grabbed the coupons out of Mr. Reed's hands right away?—A. That was Mr. O'Donnell.

Q. Did you hear Mr. O'Donnell immediately ask Mr. Reed who he got them from?—A. Yes.

Q. And he said he got them from Buttitta?—A. Yes.

Q. And you have those two coupons?—A. Yes.

Q. Are those here in court today?—A. I do not know if they are. Mr. O'Donnell would have them if they are.

Q. Then you ordered the men to get out of the car, did you not?—A. They were getting out of the car then.

Q. You searched the three of them then, did you not?—A. Not thoroughly.

Q. I say you searched them?—A. I searched them for weapons.

Q. Did you search them?—A. If you call that a search. I felt at the outside of their clothing, but I did not go into their pockets.

Q. Did you search DiRe?—A. No; but I felt along his clothing.

Q. You did not find any dangerous weapons on his person?—A. No.

Q. You did not arrest DiRe at that time?—A. I placed all three of them under arrest for possession of those stamps.

15 Q. DiRe did not have any stamps at that time, as far as you know?—A. No.

Q. He was simply sitting in the car with the man who sat in the back seat with two gasoline coupons in his hands; isn't that right?—A. Yes.

Q. You did not know at that time whether they were legitiinate or counterfeit?—A. No; I don't even know now.

Q. You questioned Mr. Buttitta about his driver's license?—A. Yes.

Q. And found he did not have it with him?—A. Yes.

Q. Did he have one?—A. Yes.

Q. But he did not have it in his possession; on his person?—A. No.

Q. That is the reason you arrested Buttitta?—A. Also illegal possession.

Q. Mr. Buttitta and Mr. Reed?—A. Yes.

Q. And Mr. DiRe?—A. Yes.

Q. Mr. DiRe was simply a passenger in the car?—A. Yes; he was taken along for questioning about the stamps.

Q. Was he arrested?—A. Yes; he was taken into custody.

Q. You claim now he was then and then arrested in the car on Arkansas Street?—A. He was ordered into the Police Headquarters. He was taken into custody, call it what you will.

Q. I want to know.—A. Any arrest is taking a person into custody, which I did. I did not tell him what for.

Q. Will you tell whether or not he was arrested at the car?—A. Yes.

Q. That is your last and final answer? He was arrested there?—A. Yes.

Q. Do you recall testifying at the hearing before

16 Commissioner Boyce H. Butterfield, on May 22nd, this year?—A. I do.

Q. Do you recall your testimony as given on that occasion?—A. I do.

Q. What time did this affair take place out on Arkansas Street?—A. About 6 P. M.

Q. You claim it was about 6 o'clock?—A. Wait a minute. About 5 P. M. I have it written down here. It was about 5 P. M.

Q. So that the coupons, which you say DiRe voluntarily took from his person and put up on the desk at Police Headquarters,

that was not done until about an hour later?—A. Approximately.

Q. Approximately?—A. Approximately.

Q. Is your memory as to the time you arrested the gentleman on Arkansas Street correct?—A. Yes; it was about 5 P. M.

Q. Did you testify before Commissioner Butterfield it was about 4:45 P. M.?—A. I am quite sure I testified about 5 P. M.

Q. I am referring now to some notes taken by me at that hearing. You say it was your recollection you testified at that hearing it was about 5 P. M.?—A. That is my notes.

Q. Would you mind allowing me to take a look at those notes?—A. Is it all right, Mr. Donnelly?

Mr. DONNELLY. Yes: it is perfectly all right.

By Mr. McDONOUGH:

Q. Now, here, Officer Gross, what was the original typed figure of this time, when this original note was typed out?—A. I believe it is 5.

Q. As originally typed it read 5:45?—A. Yes, sir.

Q. Now, when did you change this?—A. I do not remember, but the time is 5 P. M.

17 Q. When did you change the 5 to a pen and ink four?—A. That is not a pen and ink four.

Q. When was the change made from the original typewritten 5 to a 4, which is written over it now? When was that done?—A. I do not recall.

Q. That is all you want to tell us? That you do not recall?—A. That is right; I could not say.

Q. Now, in your description of what took place over on Arkansas Street, you stated "We then took these men in cars to Police Headquarters;" is that right?—A. Yes.

Q. Now, I have here among my statements on these notes—I will ask you this: You testified this morning that the stamps—that among the stamps which Mr. DiRe put down on the desk at headquarters, were a one A coupon and one B coupon?—A. Yes.

Q. Did you testify before Commissioner Butterfield that he put down a one A coupon, a one B coupon, and a C coupon?—A. I do not recall. I stated several coupons.

Q. Let me call your attention again to your notes. Were these typewritten out by you?—By the way, did you also testify at the hearing before Commissioner Butterfield that Mr. DiRe possessed these inventory coupons?—A. I do not believe I did.

Q. Pointing out the notes taken by me at that hearing, and ask you whether or not those refresh your recollection any as to what you testified last May?—A. It says——

The COURT. Are those notes taken by the Commissioner?

Mr. McDONOUGH. No; by me. (Resuming to witness.) After reading my hearing notes, is your recollection or memory refreshed at all as to what you testified to?

The WITNESS. It is substantially the same.

18 Q. Did you then testify that among the coupons taken from him was this C coupon?—A. I have told you what I testified to. I also testified according to my notes.

Q. Well, here—here are the Commissioner's notes. What do they show that you testified?—A. One A, one B, one C, and six 100-gallon coupons.

Q. And you now testify that you found one A, one C, and two 100-gallon inventory coupons?—A. That is right. Those were in his possession. That is right.

Q. Why this change from this to two of the inventory coupons? Any particular reason?—A. I do not know. These are the notes I believe I have testified to before.

Q. Let us consult your own notes as originally typed out. You have written over it, too?—A. Yes.

Q. As original typed, you had one B?—A. Yes.

Q. And that is crossed out?—A. Yes.

Q. It is your testimony now, I take it, that you want this Court and the jury to believe that the coupons Mr. DiRe put on the desk were one A, one C, and two 100-gallon inventory coupons?—A. He had several coupons there.

Q. I am asking about gasoline coupons. There was one A, one C, and two 100-gallon coupons?—A. Yes.

Q. He also had a number of fuel oil coupons?—A. Yes.

Q. How many?—A. I do not know.

Q. Those are O. P. A. coupons?—A. Yes.

Q. Was an investigation made as to the legitimacy or illegitimacy of the coupons?—A. I do not know. I believe the O. P. A. did make such an investigation.

Q. I see. You claim now that DiRe was arrested at the car on Arkansas Street, do you?—A. That is right.

Q. Did you, or did you not testify at the hearing before
19 the Commissioner that DiRe was not arrested at the car, but was told he was taken in for investigation?—A. I believe I so testified.

Q. Do you want to tell the Court and jury now that the Defendant, DiRe, was arrested at the car on Arkansas Street?—A. He was what you would call under arrest. He was taken into custody.

Q. Was he, or was he not, arrested?—A. Yes.

Q. You had no charge placed against him?—A. I had no charge.

Q. You arrested him without reason?—A. He had possession of the coupons.

Q. You had not as yet got any coupons from DiRe?—A. No.

Q. The only ones you got were from Mr. Reed, and he told you he got them, not from DiRe, but from Buttitta, the driver?—A. That is right.

Q. Yet you arrested DiRe?—A. Yes.

Q. You told us you searched DiRe once at the car?—A. Yes.

Q. When did you next search him?—A. He was searched in Police Headquarters. He was asked to bring all his possessions out, which he done, before being placed in the cell block. He was given a thorough search.

Q. How about before—at 6 o'clock, when he put the other coupons on the desk—was he searched thoroughly?—A. His pockets were possibly gone through.

Q. Was he or was he not?—A. By myself and the O. P. A.

Q. Did you go into his pockets?—A. I do not recall.

Q. Did any one go into his pockets?—A. I don't believe they did. I do not know.

Q. So far as you could see at that time, was he given a thorough search?—A. Not what I call a thorough search.

Q. This was in what room in Police Headquarters?—A. The Bureau of Criminal Investigation.

Q. What time was this?—A. I take it about 6:30.

Q. What was done with the defendant, DiRe, then?—A. He was questioned from then on until 8 o'clock.

Q. Was he in the same room with Reed and Buttitta?—A. No.

Q. Where was he taken?—A. DiRe was in the Bureau of Criminal Investigation.

Q. This was at 6:30 when the second search was made, when you believe some one went through his pockets? Where was he from that time until 8 o'clock when you claim you searched him again?—A. In the Bureau of Investigation.

Q. Where is that?—A. On the third floor.

Q. Was he alone?—A. I was in the office most of the time.

Q. You were questioning DiRe at all times?—A. Not continuously, but practically all the time.

Q. Eventually you decided to put a charge against him; is that right?—A. That is right.

Q. There had been no charge put against him at the time you made this final charge?—A. There had been no charge.

Q. He had been in Police Headquarters, you say, for some three hours, and still no charge placed against him?—A. No.

Q. Was he searched again between 6:30 and 8 o'clock when you say you made this final search?—A. I do not believe so.

Q. How many times was he searched?—At the car you felt of his clothing—at Police Headquarters about 6:30 and

21 then again at 8 o'clock. Up to the time of the final search, no charge was placed against him?—A. No; we were investigating him for the possession of these stamps.

Q. Up to this time, no charge had been placed against him, and finally you claim you searched him again about 8 o'clock?—A. Yes.

Q. And this is the time you claim you found this envelope, Government's Exhibit No. 2 for identification, upon the person of Mr. DiRe?—A. Yes.

Q. How was it fastened?—A. He had a jacket and sort of a lumber shirt on. He had old clothes on. I do not recall the color.

Q. Did he have a red plaid hunting shirt or working shirt?—A. It was a heavy woolen material.

Q. They both came outside his trousers?—A. Not the shirt.

Q. The shirt was tucked into his trousers?—A. That is right. The shirt where I found the stamps.

Q. He was in working clothes?—A. Yes.

Q. It was only after you claimed that you found this envelope with these coupons on the person of Mr. DiRe that any charge was placed against him? Is that right?—A. There was no charge placed against him.

Q. Wasn't there any charge placed against him then? He was locked up without any charge being placed against him?—A. He was held for further investigation.

Q. And no charge placed against him?—A. Until the following da[illegible].

Mr. McDonough. I think that is all, Officer.

The Court. You say you found the 100-gallon coupons?

The Witness. The first time we found any was about 6:30 P. M.

22 The Court. That was the 100 gallons?

The Witness. No; that was found around 8 P. M.

The Court. What did you find when you searched at 8 o'clock?

The Witness. That was 100 stamps—inventory stamps in the concealed white envelope.

The Court. You testified before the Commissioner that you found these 100-gallon inventory coupons? You took them from his clothes?

The Witness. Yes; I believe that was about 6:30.

The Court. All right.

Redirect examination by Mr. Donnelly:

Q. Mr. Gross, from your experience as a police officer—your experience of seven years—in investigating—when you come on more than one person or two persons together, why do you——

Mr. McDonough. I object.

The Court. Sustained.

EDMUND M. O'DONNELL, a witness called by, and on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. DONNELLY:

Q. What is your education, Mr. O'Donnell?—A. Bachelor of Arts Degree from Notre Dame University.

Q. You are now employed by the O. P. A. as an investigator?—A. Yes.

Q. When did you first become employed by that department?—A. January 15th of this year.

23 Q. Prior to that time, where were you employed?—A. F. B. I. Special Agent.

Q. Do you know the defendant, Michael DiRe?—A. Yes.

Q. Tell the Court where you saw him, and how you happened to be there. I want all the facts.—A. I first saw the defendant sitting in an automobile, on Arkansas Street in the City of Buffalo about 5 P. M., this was on April 14th, 1944. We had been following the automobile driven by Frank Buttitta. We followed it from West Ferry and Niagara Street to——

Q. Why did you follow it?—A. Because we had information that Buttitta was selling counterfeit gasoline coupons, and was going to sell them that afternoon to a man named Reed.

Q. Who told you that?—A. Reed did.

Q. Therefore, you were following that automobile?—A. Yes; we followed the automobile to Arkansas Street. We got out of the car, opened the door, and told Buttitta to get out into the street. Mr. Gross went around the front of the automobile and was unable to open the door, because the handle was knocked off. I recall seeing Reed with two coupons in his right hand.

Q. Have you those coupons?—A. I have.

Q. I ask that they be marked for identification at this time, coupons taken from the hands of Mr. Reed by Mr. O'Donnell.

(Thereupon the coupons taken from Mr. Reed, referred to, were marked as "Government's Exhibit No. 3" for identification.)

By Mr. DONNELLY:

Q. Go on, Mr. O'Donnell.—A. I asked Reed where he got the coupons, and he said "I got them from him" [pointing to Buttitta].

24 Q. What happened?—A. After Detective Gross got the defendant out of the car, and Mr. Gross, the defendant and Buttitta were all standing in the middle of the street, Mr. Gross gave the defendant and Buttitta a quick frisk, and said "We will take them to headquarters." I rode down with Buttitta and

Reed drove his truck down, driving between the police car and the other car.

Q. When did you see the defendant, DiRe?—A. We took him up to the third floor into the office there. He was told by Detective Gross to empty his effects on the table, which he did.

Q. What did he disgorge on the table?—A. Six 100-gallon coupons—one A, 10 C, and I think 54 fuel oil coupons.

Q. Have you those with you?—A. Yes, sir.

Q. Let me see them, please. You heard Mr. Gross testify there were only two. How many were there?—A. Six.

Q. Why are there only two?—A. I sent them to our New York office to determine whether they were genuine.

Mr. DONNELLY. I ask that these be marked for identification.

(Thereupon the coupons, above referred to, were marked as "Government's Exhibit No. 4" for identification.)

By Mr. DONNELLY:

Q. Did you have any conversations with this defendant?—A. I did.

Q. Will you state them, please?—A. Upon the first interview, he said that he had just finished work, and had met the defendant who had asked him to go for a ride, and that is how he happened to be in the automobile. We asked where he got the coupons he had in his possession. He said they were given to him. He said he got the additional oil coupons from customers, to whom he had delivered oil that day.

Q. What did he mention about coupons, which are Exhibit No. 1?—A. He said somebody gave them to him.

Q. Did he say anything pertaining to the coupons discovered in the envelope on his person?—A. When Mr. Gross took them off of him, he said "I'm gone." We asked where he got them, and he said a man by the name of Joe had given them to him down in Andy's place, a tavern down on the Terrace.

Mr. DONNELLY. You may ask.

CROSS-EXAMINATION

Mr. MCDONOUGH. May I see the Commissioner's trial notes, Your Honor?

By Mr. MCDONOUGH:

Q. Well do you claim now, Mr. O'Donnell, that you saw six inventory coupons which DiRe put up on the table in Headquarters?—A. Yes. That is my recollection.

Q. Did you so testify before Commissioner Butterfield at the preliminary hearing?—A. I believe I did.

Q. Let me show you the Commissioner's original notes, and ask whether his notes refresh your recollection. He has briefed your testimony. Now here, he said "Took him to police." Then "Found one C, one A, 110, two inventory 100 gallons—55—53 gallons fuel oil coupons."—A. Then I was mistaken. I recall there were six taken.

Q. Now, it appears that you testified before the Commissioner there were only two 100-gallon coupons. There were only two put on the table by DiRe? There is no doubt about it, is there, that whatever coupons Mr. DiRe produced at that time when
26 he was first taken to Police Headquarters were produced voluntarily?—A. As far as I know. He was told to empty his pockets.

Q. And he did so?—A. Yes.

Q. Did it voluntarily?—A. Yes.

Q. Now, you claim you sent four coupons down to your New York office?—A. Yes.

Q. Are they here today?—A. No.

Q. They have never been returned?—A. No.

Q. And two of these alleged six coupons are kept and are marked "Government's Exhibit No. 1" for identification here today?—A. That is right.

Q. What time did you say it was that Mr. DiRe put the coupons, the A, B, and C, and fuel oil coupons on the table?—A. I would say about 6:15 or 6:30.

Q. You testified at the preliminary hearing that you were a counterfeit specialist employed by the O. P. A.?—A. Yes.

Q. Have you examined, first of all, the A coupons and the C coupons in Mr. DiRe's possession?—A. Yes.

Q. Did you find them to be genuine?—A. Yes.

Q. Did you examine the fuel oil coupons in Mr. DiRe's possession?—A. Yes.

Q. Did you find them to be genuine?—A. Yes.

Q. Have you made a preliminary examination of the two one hundred gallon inventory coupons marked "Government's Exhibit No. 1" for identification?—A. Yes.

Q. But the other four coupons, which you say he produced that day, have never been returned?—A. No; they merely sent us an opinion——

Q. I see. They have never been returned?—A. No.

Q. They were sent down there some time in April?—A. I would say probably April 15th or 17th.

27 Q. About four months ago?—A. Yes, sir.

Q. By the way, you also searched Buttitta?—A. No; I did not search Buttitta.

Q. Some one did in your presence?—A. Yes.

Q. You found a number of coupons on him?—Is that right?—A. Yes.

Q. And you also testified, as Officer Gross did, that immediately when you opened the door and seized the coupons from Mr. Reed, you asked whom he got them from, and he pointed to Buttitta, the driver, and said he got them from him?—A. Yes, sir.

Q. Now, you took a written statement from Mr. Reed, did you not?—A. Yes.

Q. And no written statement was taken from the defendant, DiRe, at any time?—A. Not by me.

Q. This is the question I neglected to ask Officer Gross. You know there was no written statement taken from him?—A. Not as far as I know.

Q. You have never seen any?—A. No.

Q. It is reasonable to suppose that any documentary evidence would be shown to you?—A. Yes.

Q. Although one was taken from Mr. Reed, you say?—A. Yes.

Q. Now, you testified, Mr. O'Donnell, to everything that you considered of importance in this case at the Commissioner's hearing?—A. I believe I did.

Q. You testified as to your conversation with the defendant, DiRe, both at the car and at Police Headquarters that day, did you not?—A. I believe I did; yes.

Q. I wish you would look through the Commissioner's brief on your testimony——.

28 Mr. DONNELLY. If it please the Court, I think the jury should be instructed it is the Commissioner's impression of what he heard.

The COURT. I will allow him to look at the notes.

By Mr. McDONOUGH:

Q. Will you look through that statement, and see whether you see anything about any statement which you now claim this defendant made when these 100 coupons were found, as far as saying "I'm gone"?—A. I do not find it in mine.

Q. Will you look at Officer Gross' testimony, and see whether you find anything in the Commissioner's statement as to his testimony?—A. No, sir; I do not.

Q. You know as a matter of fact that you testified to no such statement at the Commissioner's hearing?—A. No; I do not see anything here that indicates that.

Mr. McDONOUGH. That is all.

Redirect examination by Mr. DONNELLY:

Q. One question, Mr. O'Donnell. The envelope which contained the 100 coupons, as recovered or removed from the defend-

ant's person by Mr. Gross, were any of those stamps removed for examination?—A. Yes, sir.

Q. Do you recall the number?—A. Five or six.

Q. They were for chemical examination?—A. Yes.

The COURT. Will you describe where the envelope was found?

The WITNESS. In his trousers, in between the heavy shirt he had on and his undershirt.

The COURT. That is all.

Mr. DONNELLY. That is all.

29 HARRY G. KLENK, a witness called by and on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. DONNELLY:

I wish to offer in evidence at this time Government's Exhibits Nos. 1, 2, 3, and 4.

Mr. McDONOUGH. I will ask your Honor to excuse the jury while I argue at length on this.

The COURT. The jurors are excused until 2 o'clock. In the meantime you are not to discuss this case with any one until it is finally submitted to you.

(Jury left court room at this time.)

Motion to suppress evidence and exhibits, etc.

Mr. McDONOUGH. I object to the admission of the four Government exhibits, Nos. 1, 2, 3, and 4 in evidence, on the ground that the search of the defendant was illegal—and I also move that the evidence and exhibits be suppressed on the same grounds. It is conceded that when a legal arrest is made on probable cause an officer may search the person arrested, and that any material evidence found in that search may be admissible. At the scene of this alleged offense on Arkansas Street on April 14th, 1944, at somewhere between five and six P. M., did the police have probable cause to search and arrest Michael DiRe at that time? We have a situation here concededly where the police might arrest Buttitta because he did not have an operator's license. Concededly they might arrest Reed, because they found in his possession two 100-galion coupons. Now, as to the defendant DiRe, we find him in the case as a passenger, pure and simple. The Court will bear

30 in mind that the car in which the illegal transaction took place was not DiRe's car. The defendant is not liable to arrest. The defendant, DiRe, is a passenger in that car, pure and simple—up to that point neither the police nor the O. P. A. have one bit of evidence to connect DiRe with the crime. Reed said subsequently "I got these coupons from Buttitta." It appears that

Reed told them he was just finished work and had been invited to go along for a ride by the driver of the car. Up to that time, I consider, your Honor, there was no probable cause for arrest, although Officer Gross claims that he forthwith arrested the defendant. I submit the testimony in that respect is questionable, because in his testimony, two or three times, he was asked as to whether he was merely ordered to Headquarters for investigation or arrested, but in his final statement he said that he was arrested. I submit there was no probable cause.

Your Honor will keep in mind the testimony of Officer Gross, and also Officer O'Donnell, who just testified that no charge was placed against the defendant DiRe. He was searched, not only at the car, but he was searched at Police Headquarters, and instructed to put what he had in his pockets on the table. He was held for some three hours by these officers without charge, and even after the alleged counterfeit inventory coupons were found on him, still no charge was placed against him.

I submit the search was illegal, and the arrest was illegal, and on the face of this I object to the introduction of these coupons, and move that this evidence should be suppressed.

31 Mr. DONNELLY. If it please the Court, the question of arrest may always be divided into an arrest with a warrant and an arrest without a warrant. If it is made with a warrant, it is presumed that the officers have a reasonable ground. The most frequent are the arrests made without a warrant, but with reasonable cause to believe that crime is being committed.

Now, Officer Gross, and Inspector O'Donnell testified they had information that the defendants were about to make a deal in coupons. That Buttitta was about to make a deal,—and they were justified in following them down Ferry Street, or whatever devious path they traversed to Arkansas Street, and looking into that car. Upon looking in that car and observing the man, Reed with coupons in his hand, they had reason to believe that all persons in that car were involved in that crime, either as accomplices, or otherwise.

The defendant was in the car. Searches are general, and searches of this kind have always been sustained. The test is reasonableness. What would a reasonable man have done? Did the officer act unreasonably under the circumstances, when the circumstances were such as to lead a reasonable man to believe that a crime was being committed? I submit the documents should be received in evidence.

The COURT. I will receive them.

Mr. McDONOUGH. May I have an exception?

The COURT. You may. This Court will recess until 2 o'clock.

(Whereupon a recess was taken until 2 P. M.)

32 After recess, 2 o'clock P. M.

Appearances: As before noted.

(Thereupon Government's Exhibits 1, 2, 3 and 4, previously marked for identification were received in evidence.)

HARRY G. KLENK, resumed the stand on behalf of the Government and testified as follows:

Direct examination by Mr. DONNELLY:

Q. You are a member of the Police Department?—A. I am.

Q. In what capacity do you serve the department?—A. Detective Sergeant, Squad Leader covering the west side of the City of Buffalo.

Q. How many years have you been in that department?—A. 20.

Q. 20 years?—A. Yes.

Q. Have you lived in the City of Buffalo all your life?—A. Yes.

Q. Do you know the defendant, Michael DiRe?—A. Yes, sir.

Q. How long have you known him?—A. Probably 15 years.

Q. You have heard the previous testimony as to what happened in Police Headquarters on the day of his arrest?—A. I did.

Q. You were present at the time, were you?—A. I was not.

Q. What time did you arrive there?—A. 12 o'clock midnight.

Q. Did you have a conversation with the defendant at that time?—A. I did.

33 Q. Will you state that conversation, please?—A. On the morning of April 15th, about 12:30 A. M., Edward O'Donnell, the O. P. A. Investigator and myself, went up into the cell block and talked to Mike DiRe. I asked him whom he got the stamps from.

The COURT. The stamps?

Q. The gasoline ration coupons?—A. Yes, sir. He said he got one from a fellow, but did not know his name. He said he knows him by the name of Joe, but he could not describe the fellow to me. He said he thought he lived in Rochester, and he would generally meet him in front of Andy's tavern on the Lower Terrace, and West Genesee Street, and generally would meet him on Monday afternoon.

Q. When did you next have occasion to converse with the defendant?—A. On the afternoon of June 8th, 1944.

Q. What did he say and what did you say?—A. I asked him when he last saw Frank Buttitta. He said about 3:30 P. M. on June 7th, when he was driving north on Prospect Avenue in an automobile with Frank Miano. He said the street intersection was Porter Avenue. Another automobile pulled up alongside and stopped. He got out to converse with us. The driver of this other automobile, who had been alone in his car, was Frank

Buttitta. I said "What conversation did you have with him?" He said Frank Buttitta told me he knew of a couple of fellows who could fix up the gas ration coupon arrest. I said "What did you tell them?" He said since he knew the two fellows could fix up this case, and he did not have any money, he said "I told him to go ahead and fix the case up." I asked if he had any other conversation, and he said "No."

Mr. DONNELLY. You may ask.

34 Cross examination by Mr. McDONOUGH:

Q. Officer Klenk, you say you first saw the defendant, DiRe, at Police Headquarters about 12:30 A. M. on April 15th?—A. Yes, sir.

Q. That was about six or seven hours after his arrest?—A. Yes.

Q. He had been locked up at Police Headquarters all that time?—A. Yes, sir.

Q. You also questioned Buttitta at that time, did you not?—A. Yes.

Q. And you also locked him up, did you not?—A. I did not.

Q. When I say "You", I mean the Police Department, either Officer Gross or some one else also locked up Buttitta?—A. Yes.

Q. Now, then, this gentleman, Mr. Reed, who was here this morning, and whom I do not see this afternoon, he was also questioned, was he not?—A. Not by me.

Q. You know he signed a statement?—A. I do not know.

Q. You know he did?—A. I do not know. I do not recall being told he signed a statement.

Q. You heard Mr. O'Donnell testify to that?—A. I did not know he had.

Q. You heard Officer Gross testify that Reed signed a statement?—A. I did.

Q. Did Buttitta sign a statement?—A. No, sir.

Q. It is your custom in the Police Department, after questioning defendants, to obtain a written statement?—A. If they care to give it.

Q. No written statement was taken from Mr. DiRe?—A. No, sir.

35 Q. And no written statement was taken from Buttitta?—A. No, sir.

Q. Yet you claim Mr. DiRe made these statements to you in the cell block voluntarily?—A. Yes.

Q. And when you asked Mr. DiRe in the cell block where he got the coupons, you used just those words, I assume "The coupons," did you not?—A. I believe I did.

Q. You did not say "Where did you get the A coupons, the B coupons and C coupons, and oil coupons or inventory coupons?—

A. I believe I specified the coupons he had on him. I did not specify A, B, C, or D, or anything like that.

Q. It has been testified he had several varieties of coupons on him?—A. Yes.

Q. You used the word "coupons" only, did you not?—A. Yes.

Q. Referring to gasoline or any type of coupons, you did not do that?—A. No.

Q. You simply said "Where did you get the coupons?" or "Who gave you the coupons?"—A. Yes.

Q. And he said a fellow named Joe from Rochester, whom he met on Monday afternoon.—A. Whom he generally meets.

Q. Did he say he was a customer of his?—A. He did not say he was a customer, but inasmuch as he generally meets him there on Monday afternoons, he might be.

Q. Was any attempt made to check up on him?—A. No. I asked if he knew the license number, and he said "No." He could not give any description of the car or the man.

Q. That was all the conversation you had with him that night?—A. Yes.

Q. Who was with you?—A. Ed. O'Donnell.

Q. The gentleman who testified this morning?—A. Yes.

36 Q. You next talked to him on June 8th?—A. Yes.

Q. That was while this case was pending?—A. Yes.

Q. He told you he had talked to Buttitta, when he saw Buttitta with another fellow on Prospect Avenue?—A. He was with another man.

Q. When DiRe was with another man, and they saw Buttitta and stopped and talked?—A. That is right.

Q. You said that Buttitta,—you quote DiRe as having said that when he talked to Buttitta, he said he knew a couple of fellows who could fix up the gasoline coupon case, and DiRe said "All right. Go ahead and do it, because I haven't got any money?—A. That is right.

Q. And that is the only two conversations you ever had with Mr. DiRe?—A. Relative to this case, yes.

Q. Now, you say you secured no written statement,—you nor any one else,—as far as you know secured any written from DiRe?—A. No.

Q. Were you there one time, or any time, during the evening of April 14th, before your conversation with DiRe in the cell at 12:30 on the morning of April 15th?—A. I was there until 8 A. M.

Q. How long was DiRe detained at Headquarters, before he was admitted to bail?—A. The following morning when the O.

P. A. finished their investigation. The following day he was arraigned before the Commissioner.

Q. After that conversation with DiRe, and that conversation with Buttitta—strike out that, please. Your conversation with Buttitta;—strike out the whole thing. Were you present at any time when various individuals were brought in to look at DiRe and Buttitta in Police Headquarters?—A. I was not.

Q. You do not know whether or not a number of gasoline
37 dealers were brought into Headquarters, and asked to look at the defendant DiRe and look at Buttitta and look at Reed?—A. I was not there. I did not report for work until 12 o'clock.

Mr. McDonough. That is all.

Mr. Donnelly. That is all.

Joseph R. Lipsher a witness, called by and on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Donnelly:

Q. By whom are you employed?—A. The O. P. A.

Q. Where are your offices?—A. New York City.

Q. What department are you in?—A. The enforcement end.

Q. What branch?—A. Counterfeiting Branch.

Q. What is your title?—A. Regional Counterfeiting Specialist.

Q. What are your duties?—A. To act as final authority on all questionable ration currency.

Q. By that word do you include gasoline rationing coupons?—A. Yes, sir.

Q. Of all varieties?—A. Yes.

Q. What is your education?—A. Bachelor's degree in Science, St. Johns University.

Q. In Brooklyn?—A. Yes.

Q. How long have you held your present position?—A. I have been with the O. P. A. since the early part of January 1942.

Q. Your present position is counterfeit specialist?—A. Since December 1943.

38 Q. Since that time, how many coupons have you examined?—A. Literally thousands.

Q. Would it be tens of thousands?—A. I would say so.

Q. Have you examined Government's Exhibit No. 4 in evidence,—1, 2, 3 and 4,—in which I include the contents of the envelope?—A. Yes, sir, I have examined them.

Q. You have examined those exhibits before coming here to court today?—A. Yes.

Q. On previous occasions?—A. Yes.

Q. Are you capable of giving an opinion as to the validity or invalidity of those coupons?—A. Yes.

Q. What is your opinion?

Mr. McDonough. I object on the grounds that the witness has not been qualified, and second, that the question is being asked without the proper basis being laid as to any comparison, and on the ground that the testimony is incompetent, irrelevant, and immaterial.

By Mr. Donnelly:

Q. I will examine him further. What are the tests or standards which you apply to determine the validity or invalidity?—A. I have examined them under the ultra violet light.

Q. What does the true coupon show?—A. Certain characteristics about the paper. These coupons, while the printing of the form is on Government paper, contains papers which are not genuine.

Q. You examined these coupons, Exhibits 1, 2, 3 and 4?—A. 1, 2 and 3. I have looked at the others, and they are, in my opinion counterfeits. The fuel oil coupons appear to be genuine.

39 Q. What other standards do you apply? Standards of comparison?—A. Yes.

Q. Have you a true issue with you of the ration blank?—A. Yes, sir, I have.

Q. Have you used that as a standard of comparison?—A. These are genuine 100-gallon coupons.

Q. In connection with the government printing and engraving plant, have you any connection with that?—A. I have.

Q. How frequently?—A. I spent several weeks down there in Washington, and have visited various government printing plants in various parts of the country.

The Court. You determine by the ultra violet rays and by the papers?

The Witness. That is one of the tests, the other test would be by comparison with a 100 gallon genuine inventory coupon.

The Court. What are the distinctions sometimes made?

The Witness. In this particular coupon, for one thing, the color of ink is a much, much lighter shade of green than used for the genuine. The style of job differs. Then the over-all size, it varies by about 1/16 of an inch.

Q. You have a standard with you?—A. Yes, sir.

Mr. Donnelly. I offer the standard of in evidence.

Mr. McDonough. There is no objection to those.

(Thereupon the coupon referred to above was marked as Government's Exhibit No. 5 in evidence.)

By Mr. DONNELLY:

Q. Based on all known standards—on all known stand-
40 ards of comparison which you applied to these exhibits, what is your opinion as to their validity or invalidity?

Mr. McDONOUGH. I object to that as incompetent, irrelevant, and immaterial. No proper basis for this testimony.

The COURT. Overruled.

The WITNESS. I believe these coupons are counterfeit.

By Mr. DONNELLY:

Q. What ones do you mean?—A. Nos. 1, 2 and 4. I think No. 3 contains the fuel oil coupons.

Mr. DONNELLY. You may ask.

Cross examination by Mr. McDonough:

Q. So there is no mistake, Exhibit No. 4 contains the oil coupons. Mr. Lipsher, you speak of the ultra violet ray machine and the application of that machine for the purpose of determining the genuineness, or whether the coupons are counterfeit?—A. Yes.

Q. Will you describe that machine to us, please?—A. The machine has a powerful bulb, over which is attached a filter. The general thing in the use of the lamp, or of a lamp like that would be to bring out fluorescent qualities of the papers.

Q. What fluorescent qualities would be brought out?—A. Two on genuine paper. One, the face of the coupon, a government device which shows the Eagle on similar lines. Secondly, it might show up what is known as fluorescent fibers. Fluorescent fibers did not appear in the genuine 100-gallon inventory coupons.

Q. Let us put it this way: The ultra violet ray ma-
41 chine will bring out the background that is the American Eagle and lines of the words United States Government,—shall we call it a mark?—A. It is known as a processed design.

Q. That is manufactured or printed right into the paper?—A. Yes.

Q. Is the ultra violet ray machine very large?—A. No, sir. It can be carried.

Q. Did you bring one here?—A. No, sir.

Q. You say it would be easy enough to bring one, and you have not one here?—A. That is right.

Q. They are portable?—A. Yes.

Q. A small portable machine?—A. Yes, sir.

Q. How is it you did not bring one here?—A. I did not bring one.

Q. Did you not think it of some importance or help to the Court to distinguish these fluorescent qualities of the paper that you

described?—A. I could not say. I examined them under the light in Buffalo and in New York.

Q. You are stating that to be a fact, but at the same time you did not bring the machine itself in order to demonstrate those qualities here?—A. I did not.

Q. Are there any other tests, in addition to the violet ray will bring out these processed designs in genuine paper?—A. On the face of the coupons, no. Only the ultra ray will bring out the fluorescent qualities in the processed design.

Q. Do you not know of any other way to bring out that design?—A. No, not that design.

Q. Can you name any ingredient, which, if applied, to those genuine coupons, would bring out the design?—A. Yes. Clorax will bring that out.

Q. Is it true that any of many chemicals which contain the same ingredients as the one you described, Clorax, would accomplish the same result?—A. Yes.

42 Q. Just what is the chemical which does that?—A. I could not say offhand.

Q. Would you let me see that Exhibit No. 5, which is genuine? Now, may I see the Government's Exhibit No. 1, which are the coupons which were produced by Mr. DiRe in the police station? Exhibit No. 3 is the two coupons taken from Mr. Reed at the automobile. Exhibit No. 1 is the two coupons which DiRe is alleged to have placed on the table at police headquarters. Is that correct, Mr. Donnelly?

Mr. DONNELLY. Yes.

By Mr. MCDONOUGH:

Q. Does the ink the Government's printing presses ever run in different shades?—A. Occasionally.

Q. You can very well have coupons which show a different shade?—A. Very slight.

Q. There is a variation in different runs?—A. Yes.

Q. These coupons were printed like any other printed matter?—A. Yes.

Q. The presses are connected, and run, and after a great many have been run off, they become a lighter shade?—A. When it begins to vary, they are re-inked.

Q. The minutes they start to run through the presses, each impression makes some change in the impression?—A. Yes.

Q. Naturally it comes to a point so much lighter that whoever is in charge deems it necessary to re-ink the presses?—A. Yes.

Q. That is the same thing that happens in any other establishment—a newspaper, or anything else?—A. That is right.

Q. Now, on these genuine coupons, which you have
43 defined as Government's Exhibit No. 5, I note here show through the printing some parallel lines running through the coupons, with what appears to be the start of the word "Government." What do those read?—A. "United States Government Ration."

Q. And here you have at the right-hand side on the lower edge apparently the Eagle design to which you have referred? Is that true?—A. That is right, sir.

Q. You cannot see that from the back of the coupons. That is your process design which you talked about?—A. Yes, sir.

Q. Let us take these two coupons, which are of a lighter shade and take the paper and look at these. We see here, if you will follow me over here, I note at the left-hand corner the letters "O. U.," and down here I see "Ration"?—A. That is right.

Q. And I notice here where the lower part of the Eagle design is down here, a part that does not show on the back?—A. No.

Q. That is also part of the process design of that paper, is that true?—A. Yes, sir.

Q. I have here in my hand a bottle of Zonite, which is a popular compound. You have heard of that, of course?—A. Yes.

Q. I wish, Mr. Lipsher, you would take the two coupons, which are Government's Exhibit No. 1 in evidence, and the two coupons which are Government's Exhibit No. 5 in evidence, and wet the backs of those two coupons with enough of that Zonite to soak through them, and let them stand for a couple minutes.—A. (Witness does as attorney has requested.)

Q. Government's Exhibit No. 5, you will note that now
44 where you could see nothing before on the back, we can now see the word "Government," and what appears to be the right-hand edge of the Eagle design,—well, there does not seem to be as much of the design on this particular coupon. Will you just follow me here. You can see the processed design coming through on the back of this well, can you not?—A. Yes, you can see it.

Q. I am trying to find an Eagle design on here. There is some portion of an Eagle design on there?—A. May I see it?

Q. Maybe it shows over here. To bring out what I want, I have to put some of it on both of them. I have only applied the chemical to one of the exhibits.

Mr. DONNELLY. We are on the second one.

Mr. McDONOUGH. One of the exhibits of Government's Exhibit No. 5, yes.

By Mr. McDONOUGH:

Q. Here is what I am getting at. Can you see the design and parallel lines and the printing and some part of the Eagle design coming through the back of the Government's exhibit No. 1?—A. I see something very faintly. It is some part of the design here.

Q. Now, if we refer to the front of the coupon, on the back of which the design is now coming through, you do see——

Mr. DONNELLY. I object to that.

The COURT. Let him state what he does see.

By Mr. McDONOUGH:

Q. Let us take this coupon.

Mr. DONNELLY. Is that the front or back?

The COURT. Referring to Exhibit No. 1.

45 Mr. DONNELLY. Is that the face?

Mr. McDONOUGH. The face. We see a part of an Eagle design and some parallel lines and the printing.

By Mr. McDONOUGH:

Q. On the back of that, after being treated with Zonite, do we see part of an Eagle design coming out immediately back of where the Eagle design is?—A. I see some parallel lines.

Q. Don't you see some printing?—A. Yes.

Q. It is apparently the reverse of what shows on the face of the coupon, is not, in that identical corner?—A. It could not very well be the reverse.

Mr. DONNELLY. I object.

The WITNESS. No, sir, I would not say that.

By Mr. McDONOUGH:

Q. I am referring to this corner right here. You see the design in the corner of some kind of a design?—A. Yes.

Q. In that same corner, on the reverse, do you not see that design?—A. No, sir. This side shows arrows, and this side shows something resembling an olive branch.

Q. You know before we applied the chemical, one of the coupons of Exhibit No. 1, and one on Exhibit No. 5, the backs were blank?—A. Yes.

Q. And whatever appears on the back on Government's Exhibit No. 1 and on Government's Exhibit No. 5, was brought out by that Zonite?—A. Yes.

Q. When we speak of this Government and Eagle design, you do not mean that each coupon has a full Eagle?—A. No.

Q. You mean the sheets are given this process of Eagle lines, and so on, and are later cut up?—A. That is right.

46 Q. Whatever particular parts of a design happens to be

on the back of one coupon does not necessarily have to be on the back of another?—A. That is right.

Q. You might have part of the words "United States Government" on one coupon?—A. Yes.

Q. And not on another?—A. Yes.

Q. It is similar to the water mark on paper?—A. It might be.

Q. Assuming that large sheets of paper are made with water marks on it, when that paper is cut up, any part of that water mark may appear on any part of that paper?—A. Yes.

Q. That is the same condition that prevails with regard to these coupons, is it not?—A. Yes.

Q. I bring that out to show we may not see exactly the same part of the design on each coupon. It may be a part of it. The coupons are cut and perforated after the design process is put on?—A. That is right.

Q. Were these coupons in Government's Exhibit No. 2 for identification put under the ultra violet ray machine?—A. Yes, they were.

Q. I do not suppose you ever applied this chemical test to any of them?—A. No, sir, I did not.

Q. The ultra violet ray test will have the same result the same as far as the processed design is concerned as the application of this chemical, will it not?—A. I do not understand.

Q. I say the ultra violet ray machine will bring out the same results so far as the processed design is concerned as this chemical?—A. No, sir.

Q. It will bring out the same results from the rear?—A. It will bring out fluorescence.

47 Q. This chemical process also brings out the processed design, does it not?—A. Yes.

Q. Now, Mr. Lipsher, as to Government's Exhibit No. 4, which contains a number of fuel oil coupons, you say these you found to be genuine?—A. They appear to be genuine.

Q. Did you examine them under the ultra violet ray?—A. I examined some of them. I would have to see them first. Yes.

Q. There were different types of fuel oil coupons there, were there not? Different colors?—A. Yes.

Q. They are all genuine, are they not?—A. They are.

Q. Well, I am still holding A and B,—wait a minute,—there is another fuel oil,—you have all the fuel oils, which you say are genuine?—A. Yes.

Q. Here are the A and C coupons. You found these genuine?—A. I do not recall examining them.

Q. Did Mr. O'Donnell also examine these exhibits?—A. I do not know.

Q. You heard him testify about it? He is also a United States Government Specialist? Did you not?—A. Yes.

Mr. McDonough. I think that is all.

Redirect examination by Mr. Donnelly:

Q. Mr. Lipsher, I ask you to look at Government's Exhibit No. 1, and ask you, after witnessing that demonstration, by Mr. McDonough, what is your opinion of it?

Mr. McDonough. I object.

By Mr. Donnelly:

Q. Has your opinion changed since his test?—A. No, sir.

Mr. Donnelly. That is all. The Government rests, your Honor.

48

Renewal of motion to dismiss, etc.

Mr. McDonough. I renew my motion to dismiss the indictment and to discharge the defendant on the grounds that the Government has failed to establish the guilt of the defendant of the crime charged, and move for the suppression of the evidence on the same grounds as previously stated.

The Court. Denied.

Mr. McDonough. Will your Honor instruct the jury that your passing on that motion has nothing to do with the guilt or innocence of the defendant?

The Court. Yes, that is true.

Mr. McDonough. I would like to call Mary DiRe. Just a moment—before calling Mrs. DiRe, I would like to call Officer Gross.

Arthur A. Gross, a witness previously sworn in behalf of the Government, was called as a witness for the defendant, and testified as follows:

Direct examination by Mr. McDonough:

Q. Officer Gross, you questioned Mr. DiRe at Headquarters, and you questioned Mr. Buttitta at Headquarters, did you not?—A. Yes, sir.

Q. You took no written statement from the defendant, DiRe, did you?—A. No, sir.

Q. You told us this morning, I believe, you did take a written statement from a gentleman named Reed?—A. Officer O'Donnell had taken the statement.

Q. A written statement was taken from Reed, was there?—A. Yes, sir, I see him making the statement.

49 Q. Your answer is "Yes"?—A. Yes.

Q. Is Mr. Reed here this afternoon?—A. I do not see him now.

Q. He was here this morning?—A. Yes.

Q. You questioned Reed at some length, did you not?—A. Yes.

Q. You have already told that when you first questioned Reed in the matter he told you he got those coupons from Buttitta?—A. Yes.

Q. Reed also told you he never saw DiRe before in his life, did he?—A. He didn't say he remembered seeing him before. I do not remember having any conversation about DiRe. I do not remember Reed saying he never saw him.

Q. Have you got Reed's statement with you?—A. No.

Q. Who has it?—A. I believe the O. P. A. Officer, Mr. O'Donnell.

Q. May I see Mr. Reed's statement? That was taken, there is no doubt about it?—A. Yes.

Q. Isn't it a fact that Reed told you in that statement and told you orally he had never seen this man before in his life?—A. I do not remember seeing it in the statement.

Q. You do say you do not remember him saying anything about DiRe?—A. I do not remember.

Mr. McDonough. That is all.

Mary DiRe, a witness called by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. McDonough:

Q. Mrs. DiRe, you are the wife of the defendant, Michael DiRe?—A. Yes, I am.

50 Q. And how long have you been married?—A. 6 years in December.

Q. And how many children?—A. Three.

Q. Where do you live?—A. 374 Rhode Island Street.

Mr. Donnelly. I do not think the witness knows anything of materiality here.

By Mr. McDonough:

Q. What business is your husband in?—A. Coal, fuel oil, and ice.

Q. How long has he been in that business?—A. Since I have known him.

Q. And how long have you known him?—A. About seven and a half years.

Q. Are there any other of his family in that business with him?—A. There were two of them.

Q. Who were they?

Mr. DONNELLY. I object to this.

The WITNESS. Ralph and Phil.

By Mr. McDONOUGH:

Q. Where are they now?—A. Ralph is in Italy and Phil is in France.

Mr. DONNELLY. I object to that.

The COURT. Strike it out.

Mr. McDONOUGH. I want to show that he is in sole operation of that business.

By Mr. McDONOUGH:

Q. Is your husband in sole operation of this family business at the present time?—A. Yes.

Q. And has been how long?—A. About three and one-half years, I believe.

Q. Have his two brothers been in the army during that time?

51 Mr. DONNELLY. I object.

The COURT. Sustained.

Mr. McDONOUGH. Exception, please. I think that is all. Oh, just a minute. Did you know Frank Buttitta?

The WITNESS. Yes.

By Mr. McDONOUGH:

Q. Well or casually?—A. Casually.

Q. How did you know him?—A. He lived around the block, about a block from us, and used to take ice from us.

Q. That was the extent of your acquaintance with him?—A. Yes.

Mr. McDONOUGH. That is all.

Cross examination by Mr. DONNELLY:

What was your maiden name?—A. Spano.

Mr. McDONOUGH. I object.

The COURT. Overruled.

Renewal of motion to dismiss, etc.

Mr. McDONOUGH. Exception. The defendant rests, your Honor. Let the record show the renewal of my motion to dismiss the indictment and discharge the defendant on the grounds that the People have failed to show guilt. I ask for a directed verdict of acquittal on the same grounds previously stated.

The COURT. Motion denied.

Mr. MCDONOUGH. Exception.

(Whereupon a short recess was taken.)

The COURT. The jury will disregard the relationship of the last witness to the defendant.

Charge of the court

52 Ladies and gentlemen of the Jury:

You have listened attentively to the evidence that has been adduced in this suit, and I am sure you will give it the consideration you should. The case is important.

A criminal case results through an indictment presented by a Grand Jury, and that, as I have stated to some of you before, may be described as in the nature of a complaint or pleading. It advises the defendant, jury and the Court of the charge made against the defendant.

This particular indictment charges that this defendant on the 14th day of April, 1944, knowingly, unlawfully and wilfully had in his possession a quantity of gasoline ration coupons, in violation of Sections 1394 and 8178 of the ration regulations issued by the Office of Price Administration. We all know the reason for the enactment and the adoption of these regulations. It is to conserve gasoline.

In this criminal trial, the burden rests upon the Government to establish the guilt of the defendant beyond a reasonable doubt. An understanding of the meaning of those words is not difficult. Reasonable doubt is a doubt based on thinking, on reason, on judgment. It means, as applied to this case, that if after you have heard all the evidence in this case, you find the Government has not established the guilt of this defendant beyond a reasonable doubt, then you must acquit.

On the other hand, if you find the Government has established the guilt of the defendant beyond a reasonable doubt, it is your duty to convict.

There is another rule of law to be observed, and that is as
53 regards the presumption of innocence. In any criminal trial, the presumption of innocence runs through the trial in favor of the defendant until it is overcome by the evidence. You and I can presume a great many things are true which are not true. The presumption is overcome if you find beyond a reasonable doubt that the Government has established the guilt of the defendant.

The defendant himself has not taken the stand. He had the right to take the stand if he so elected. But you are to draw no inference of guilt from the fact that he did not take the stand.

The credit you give to witnesses who testify is for you to determine. In any case, especially those of any great length, there are apt to be some variances in testimony. Memory is not infallible and witnesses may honestly make mistakes with respect to matters. If you believe a man has falsified, you have the right to disregard all of his testimony; on the other hand you have the right to accept that part of his testimony which you think is true. The weight you give testimony applies to any witness.

I do not know how the jury decides lawsuits, but I know, of course, there are certain things that jurors should have in mind in considering cases. Among these may well be the appearance of witnesses on the stand, whether they appear to you straightforward in their actions and candid in their testimony. An important thing is the question of the consistency of the story told by witnesses. Then again, you must take into consideration whether they have any motive to testify falsely or not. If you find they have an interest or motive, then you will treat their testimony with especial caution and care. There is testimony given by the wife of the defendant himself. This is to be considered with care and caution. If you believe her testimony it has the same weight as any other testimony.

54

There are two questions only to be determined in this case. The first one is whether these coupons were counterfeit, and the second is whether the defendant had them in his possession.

The regulations stated prohibit the possession of counterfeit gasoline coupons, and that no person shall transfer, receive or possess any coupons except as permitted by law. This charge here is the possession of counterfeit coupons.

Several witnesses have testified, and I will briefly refer to the testimony. My purpose in so doing is to aid you in your consideration of the testimony.

Mr. Gross of the Police Department and Mr. O'Donnell of the O. P. A., apprehended three men in an automobile. You will recall what their testimony was. These men were taken to the police station. There some search was made. We are concerned only with the search of this defendant. Mr. Gross and Mr. O'Donnell said they found several hundreds of coupons on defendant's person.

Then on later search of this defendant, they found an envelope enclosing so-called inventory coupons, which entitled a dealer to a large amount of gasoline, 100 gallons—100 of these—10,000 gallons. These witnesses testified there were found concealed on the person of DiRe. That is the testimony. There is testimony, I believe, that one of the witnesses talked to his defendant some time

after twelve o'clock, and he told him he got these coupons from Joe, who was from Rochester. It is claimed as an admission
55 made by this defendant. It is claimed he also stated where he got them in Buffalo. That, in the main, is the testimony in reference to the alleged charge.

Now, in addition to that, Mr. Lipcher testified as an expert on the genuineness of the gasoline coupons. He has had long experience in the examination of these coupons. He examined them with the ultra-violet light, and his testimony is that these coupons were all counterfeit. The coupons are here for your examination.

Something was said about Reed not testifying. It rests with the Government to establish its case, and the Government may swear or not swear such witnesses as it decides.

I think there is nothing further. You have heard all the evidence. This is an important case, important not alone to the defendant, but to the Government, important that the defendant may be restrained from violating the law that others may not similarly occupy themselves.

As I said at the outset, you will decide this case without prejudice or favoritism, and bring in a verdict of guilty as charged in the indictment or a verdict of not guilty. Anything, Mr. McDonough?

Mr. McDonough. Will your Honor charge the jury that they may find from all the evidence here as to whether he knowingly had these coupons?

The Court. Yes, he must have had knowledge.

Mr. McDonough. In that respect I ask your Honor to instruct the jury that he must have the coupons with criminal intent.

The Court. That is true.

Mr. McDonough. I ask the Court to charge the jury that by his plea of not guilty, the defendant has put in issue every charge in the case.

56 The Court. That is so.

Mr. McDonough. I request your Honor to charge the jury that there is no burden on the defendant to prove his innocence, but that the burden is on the Government.

The Court. I have already so charged.

Mr. McDonough. I ask the Court to charge that if they are not convinced beyond a reasonable doubt that the coupons in the defendant's possession were counterfeit, they must acquit.

The Court. I have already so charged.

(Thereupon the jury retired to deliberate and returned to the court room later with a verdict of guilty.)

In United States District Court, Western District of New York

[Title omitted].

Proceedings Monday, August 14, 1944 at 10:00 a. m.

Mr. McDonough. If your Honor please, in advance of sentence I would like to renew my motion made at the close of the case in Jamestown last August to set aside the verdict of the Jury. I want to move to dismiss the indictment and to discharge the defendant, on the grounds that the verdict of the Jury was contrary to law and contrary to the weight of the credible evidence, and on all the grounds stated in my motion at that time.

57 I now move further in arrest of judgment on the same grounds stated in my motion to dismiss the indictment.

The Court. Motion denied.

Mr. McDonough. Exception.

In United States District Court

Notice of appeal

Name and Address of Appellant: Michael DiRe, 374 Rhode Island Street, Buffalo, New York.

Name and Address of Appellant's Attorney: Charles J. McDonough, 1002 Walbridge Building, Buffalo, New York.

Offense: Violation of Section 1394.8178 of Ration Order #5 C issued by Office of Price Administration (possession of counterfeited gasoline inventory coupons).

Date of Judgment: August 14, 1944.

Sentence: One year in jail and fine of One ($100.00) Dollars. Execution of fine suspended.

At the present time out on property bail in the sum of $5000.00.

The above named defendant hereby appeals to the United States Circuit Court of Appeals for the Second Circuit from the judgment above mentioned on the grounds set forth below.

Dated: August 14, 1944.

Michael DiRe,
Appellant.

Charles J. McDonough,
Appellant's Attorney.

58 *Grounds of appeal*

1. The verdict was contrary to law.
2. The verdict was against the weight of the credible evidence.
3. The Court erred in refusing to dismiss the indictment and discharge the defendant at the close of the Government's case.

4. The Court erred in refusing to dismiss the indictment and discharge the defendant at the close of the entire case.

5. The Court erred in refusing to direct a verdict of acquittal at the close of the entire case.

6. The Court committed various errors in its charge to the jury.

7. The Court erred throughout the trial in its admission of evidence over objection and exception of the defendant; which evidence was prejudicial to the defendant and inadmissible on the grounds urged by the defendant at the time of the admission of said evidence.

8. The Court erred in admitting into evidence certain gasoline inventory and other coupons which were allegedly taken from the person of the defendant, and which were the result of an illegal search of the defendant.

9. The Court erred in refusing to suppress evidence illegally searched for and seized from the person of the defendant.

10. The Court erred in allowing the United States Attorney to elicit the maiden name of the defendant's wife, to the prejudice of the defendant.

59 11. The Court otherwise erred in the admission and exclusion of evidence during the trial and in its rulings in questions of law.

CHARLES J. McDONOUGH,
Appellant's Attorney.

In United States District Court

Assignment of errors

Now comes the defendant-appellant Michael J. DiRe, and files the following Assignment of Errors, and respectfully shows that error has intervened to his prejudice, to wit:

1. The Court erred in refusing to grant defendant's motion to dismiss the indictment and to discharge the defendant at the conclusion of the Government's case, and at the conclusion of the entire case, upon the ground that the evidence was wholly insufficient to make out either a prima facie case for the Government or to warrant a conviction of the defendant.

2. The court erred in refusing to direct a verdict of acquittal.

3. The Court erred in denying the defendant's motion to set aside the verdict and for a new trial and for arrest of judgment on all the exceptions taken at the trial and on the errors committed because of the introduction of evidence objected to by the defendant, to which exceptions were taken.

4. The Court erred throughout the trial in its admission of

evidence over objections and exceptions by the defendant, which evidence was prejudicial to the defendant and
60 inadmissible on the grounds urged by the defendant at the time of his objections.

5. The Court erred in refusing to grant the defendant's motion to suppress the evidence taken from the defendant at the time of his arrest, on all grounds stated at the trial.

6. The Court erred in allowing the witness Lipsher to testify as an expert as to his opinion that the gasoline coupons were counterfeit. He was not properly qualified.

7. The Court erred in allowing the prosecutor to cross-examine the defendant's wife as to her maiden name.

8. The Court erred in failing to dismiss the indictment upon the conclusion of the Government's case and at the end of the entire case.

Wherefore, defendant-appellant respectfully prays that the judgment of conviction and the sentence rendered herein by the United States District Court for the Western District of New York, be reversed and held for nought.

CHARLES J. McDONOUGH,
Attorney for Defendant-Appellant.
Office & P. O. Address, 1002 Walbridge Bldg., Buffalo, N. Y.

In United States District Court

Stipulation extending time to file record

It is hereby stipulated by and between the attorney for the United States of America, plaintiff above named, and the
61 attorney for the defendant, Michael DiRe, that the defendant, Michael DiRe, have until and including the 30th day of November 1944 in which to file the printed record in the above entitled matter.

Dated Buffalo, New York, October 25, 1944.

GEORGE L. GROBE,
Attorney for Plaintiff.

CHARLES JOSEPH McDONOUGH,
Attorney for Defendant.

So Ordered.

ALEXANDER M. BELL.

In United States District Court

Stipulation settling bill of exceptions

It is hereby stipulated by and between the attorneys for the parties hereto that the foregoing record contains all the testimony

and exceptions made and taken at the trial of this action, and that the same may be settled and ordered on file as the bill of exceptions herein.

Dated Buffalo, N. Y., November 20, 1944.

GEORGE L. GROBE,
Attorney for Plaintiff-Appellee.
CHARLES J. McDONOUGH,
Attorney for Defendant-Appellant.

62 In United States District Court

Order settling bill of exceptions

Upon the foregoing stipulation, it is ordered that the foregoing may be settled and ordered on file as the bill of exceptions herein.

Dated Buffalo, N. Y., November —, 1944.

_____,
United States District Judge.

In United States District Court

Stipulation as to record

It is hereby stipulated that the foregoing is a true transcript of the record of the United States District Court in this action as agreed upon and settled by the parties hereto.

Dated Buffalo, N. Y., November —, 1944.

GEORGE L. GROBE,
Attorney for Plaintiff-Appellee.
CHARLES J. McDONOUGH,
Attorney for Defendant-Appellant.

In United States Court

Stipulation as to exhibits

It is hereby stipulated by and between the attorneys for the parties hereto that none of the Exhibits herein need be
63 printed or otherwise included in the printed record on appeal herein; that the originals may be handed up by either party on the argument of the appeal herein with the same force and effect as if incorporated in the printed record, and that they may also be referred to in the brief of either party submitted upon argument of this appeal.

Dated Buffalo, N. Y., November 20, 1944.

GEORGE L. GROBE,
Attorney for Plaintiff-Appellee.
CHARLES J. McDONOUGH,
Attorney for Defendant-Appellant.

[Clerk's certificate to foregoing transcript omitted in printing.]

64 In United States Circuit Court of Appeals for the Second Circuit

No. 160. October Term, 1946

(Argued January 6, 1947.—Decided February 3, 1947)

Docket No. 20455

UNITED STATES, APPELLEE

v.

MICHAEL DI RE, APPELLANT

Before L. HAND, SWAN, and CLARK, Circuit Judge.

Appeal from a judgment of the United States District Court for the Western District of New York, convicting the defendant of knowingly having in his possession counterfeit gasoline ration coupons.[1]

Charles J. McDonough, for the appellant.

Michael J. McMorrow, for the appellee.

Opinion

L. HAND, Circuit Judge.

Di Re appeals from a judgment convicting him of knowingly having in his possession counterfeit gasoline ration coupons.[1] The only question necessary to discuss upon this appeal is whether the documents upon which his conviction was based were obtained in violation of the Fourth Amendment. The facts, which are substantially undisputed, were as follows. One, Reed, informed O'Donnell, an "investigator" of the Office of Price Administration, that a man, named Buttitta, was selling counterfeit gasoline coupons, and that he would sell them to Reed on the afternoon of April 14, 1944. O'Donnell and another "investigator," named Neff, called to their assistance Gross, a police detective of Buffalo,

[1] Sec. 301, Second War Powers Act of 1942.

and the three in a car followed a car in which were Buttitta, Reed and Di Re, until it was parked at the curb on Arkansas Street, Buffalo. The three officials then left their car, went to Buttitta's car, and found him in the driver's seat, Di Re beside him, and Reed in the rear seat. Reed had two gasoline coupons in his hand which, upon inquiry, he said Buttitta had given him and which proved to be counterfeit. Gross arrested Buttitta, Reed and Di Re and took Buttitta and Reed with him to a police station in his car;
Neff took Di Re. At the police station Di Re was searched,
65 and concealed upon his person were found two counterfeit gasoline coupons, each for 100 gallons. If the arrest of Di Re was lawful, the search of his person was lawful, and the conviction must be affirmed; if the arrest was not lawful, the search was unlawful, and the conviction cannot stand.

As we have said, the arrest was on April 14, 1944, the indictment was found and filed on June 23rd, and the case came on for trial August 8th; meanwhile Di Re had not moved to prevent the seized coupons from being used as evidence upon his trial. However, when the prosecution offered them in evidence, his attorney objected to their admission on the ground that the search had been unlawful; and the court excused the jury, while the question was discussed upon the merits. The prosecutor did not suggest that the application had come too late; he defended the legality of the arrest because Gross "had reason to believe all persons in that car were involved in that crime either as accomplices or otherwise." He asked: "Did the officer act unreasonably under the circumstances when the circumstances were such as to lead a reasonable man to believe that a crime was being committed?" The court overruled Di Re's objection and received the coupons in evidence, but he did not state his reasons for doing so.

We shall assume, arguendo, that Gross had authority under Sec. 177 of the New York Code of Criminal Procedure to arrest Buttitta and Reed, although the crime was not against the State of New York.[2] We shall similarly assume that the federal law determines whether the crime was a felony within the meaning of Sec. 177, and that because a conspiracy is a felony under federal law, Gross's authority was measured by Sec. 177 (2) and gave him power to arrest Buttitta and Reed. By a parity of reasoning his authority to arrest Di Re must rest upon subdivision three of Sec. 177: that is, Gross must have had reasonable ground for thinking that Di Re was a party to the conspiracy of Buttitta and Reed, which was in process of execution before his eyes. However, unless the last was true, Di Re's arrest was unlawful, because although he was in fact guilty of another crime—possessing other counterfeit gasoline cou-

[2] Marsh v. United States, 29 Fed. (2) 172 (C. C. A. 2).

pons—neither Gross, O'Donnell nor Neff has any cause to think so. The question may therefore be stated barely but entirely adequately, as follows: when an officer has been informed that two persons are to deal in counterfeit documents while they are riding in a motor car, has he reasonable grounds for believing that a third person who is riding in a car along with them is a party to that transaction? We have several times had occasion to consider what relation to a conspiracy makes a man a confederate, and what relation to the principals in a crime makes a man an abettor; and we have uniformly held that the prosecution must prove the
66 accused to have associated himself with the principals in the sense that he has a stake in the success of the venture.[3] When the Supreme Court affirmed us in *United States* v. *Falcone*,[4] it held that the sale of material to those who the seller knows will use it to commit a crime, does not make the seller a party to a conspiracy of the buyers. We do not understand that the decision turned upon the fact that the seller might not have been aware that there were several buyers acting in concert; and, so far as we can see, our doctrine is a corollary of the decision, although the opinion did not expressly go so far. The discussion in *United States* v. *Harrison*[5] must probably be taken as against our view, though the decision itself may not be.

The legality of Di Re's arrest therefore depends upon whether his presence in the car when the other two were engaged in selling counterfeit coupons, was presumptive evidence that the sale was a transaction in which he had a personal interest. It was not enough that Buttitta and Reed felt confident that he would not betray them; the law does not make one a participant in crimes which one does not denounce. It is true that failure to denounce a felony is itself a crime; but that is by separate enactment,[6] which would have been unnecessary, if knowledge followed by inaction alone made one an abettor. Even if Di Re had known that Buttitta and Reed were dealing in counterfeit ration coupons, there was not the slightest reason to suppose that he was himself either a seller or a buyer; or that he had any interest whatever in their enterprise. Indeed, even though Gross had known that DiRe was in possession of similar coupons, it would have been no reason to suppose that he was interested in the coupons being traded in. Nobody would assert that all the spectators of a crime may be arrested as participants; and even though riding in a car with

[3] United States v. Peoni, 100 Fed. (2) 401; U. S. v. Bruno, 105 Fed. (2) 921 (reversed upon another point, Bruno v. U. S., 308 U. S. 287); U. S. v. Falcone, 109 Fed. (2) 579; U. S. v. Koch, 113 Fed. (2) 982; U. S. v. Zeuli, 137 Fed. (2) 845; U. S. v. Simonds, 148 Fed. (2) 177. See also Morei v. U. S., 127 Fed. (2) 827, 831 (C. C. A. 6).

[4] 311 U. S. 205.

[5] 121 Fed. (2) 930 (C. C. A. 3).

[6] Sec. 251, Title 18, U. S. Code.

two such offenders be evidence of acquaintance, or possibly friendship, with them, it would be altogether unwarranted to carry the inference further than complaisance. So far as we can see, the arrest was utterly indefensible; a mere scooping up of all those present on the chance that any associate of the principals was probably engaged in any dealings between them, or, if not, in other transactions of the same kind; and this in spite of the fact that Reed on whose information Gross acted, had not mentioned Di Re as Buttitta's confederate. If the prosecution of crime is to be conducted with so little regard for that protection which centuries of English law have given to the individual, we are
67 indeed at the dawn of a new era; and much that we have deemed vital to our liberties, is a delusion.

The prosecution has not upon this appeal attempted to support the competency of the coupons on the ground that Di Re did not apply for their suppression before the cause came on for trial. It has done well not to do so, because it abandoned any such objection when it undertook, as has appeared in the passages we have quoted, to defend the search upon the merits. Both sides having presented the point to him in this way, we should have no warrant for supposing that the judge did not decide it; but without so indicating had refused to pass on the point because Di Re had delayed too long in asserting it. We may assume, arguendo, that, if he had chosen that for his ground, and had for that reason refused to consider the merits, he would have been within his powers,[7] but he was not obliged to do so; he was free to pass by the delay and to give Di Re the benefit of the objection, if in his judgment, that would not unduly interfere with the trial. "The rule is one of practice; and is not without exceptions."[8] The last sentence of Rule 41 (e),[9] is in this regard merely a restatement of the law as it was.[10] It would be a parody on justice now to hold that, although the judge was wrong in the decision which he did make, nevertheless, since he might have refused to make it at all, Di Re may not complain of the error.

Judgment reversed.

Dissenting opinion

CLARK, Circuit Judge (dissenting).

The ground of my dissent may be shortly stated. It is that police officers cannot be held unreasonable in declining to view as a mere bystander one who accompanies a criminal to a crime

---

[7] United States v. Saili, 115 Fed. (2) 292 (C. C. A. 2).
[8] Cogen v. United States, 278 U. S. 221, 223; Gouled v. United States, 255 U. S. 298, 312, 313.
[9] Rules of Criminal Procedure.
[10] Notes of the Committee, p. 32.

rendezvous.[11] Surely rarely, if at all, will innocence be accorded such opportunity; the instigators of the meeting may seek helpers, but hardly onlookers, i. e., potential talebearers. This reaction of common sense is here supported by the other circumstances, notably the absence of any natural outcry, protest, or denunciation of his associates by Di Re on his apprehension. Less significant, but quite consistent, is the fact that Di Re was clad in ordinary work clothes. That a felony was involved is conceded. In truth there was not only the felony of conspiracy, Blumenthal v. United States, 9 Cir., Dec. 16, 1946, but also
68 the substantive felony of possessing and passing the counterfeit coupons. United States v. Serpico, 2 Cir., 148 F. 2d 95.

The issue raised concerns only the lawfulness of the arrest, for, that being established, the search follows as an incident thereto. See authorities cited by Frankfurter, J., in Davis v. United States, 66 S. Ct. 1256, 1269. Now the general and traditional rule of arrest without a warrant by a peace officer is aptly stated in the N. Y. Code of Criminal Procedure, Sec. 177, as applicable in three situations: "1. For a crime, committed or attempted in his presence; 2. When the person arrested has committed a felony, although not in his presence; 3. When a felony has in fact been committed, and he has reasonable cause for believing the person to be arrested to have committed it." Since the Serpico case shows the later finding of the counterfeit coupons upon Di Re to be a felony, it might well be contended that the second subdivision is applicable. See Wilgus, Arrest without a Warrant, 22 Mich. L. Rev. 541, 685; Holley v. Mix, 3 Wend., N. Y., 350; 18 U. S. C. A. Sec. 53a, last clause.

But accepting the third subdivision of the Statute as stating the more accepted federal principle, Carroll v. United States, 267 U. S. 132, 39 A. L. R. 790; United States v. Lindenfeld, 2 Cir., 142 F. 2d 829, 831, certiorari denied, 323 U. S. 761; 5 U. S. C. A. Sec. 300a, there would seem to be "reasonable cause" for the officers to believe that Di Re had participated in this crime admittedly being committed by Buttitta and Reed. (Actually, as later events showed, he was quite clearly a source of supply, a reserve bank, so to speak, for Buttitta in the latter's sales.) The cases have always held that it is not certainty, but only a reasonable deduction from the circumstances and positions of the parties, which justifies the arrest. See cases collected in the commentaries to the A. L. I. Code of Criminal Procedure, 1931, Sec. 21, pp. 233, 234; Miller,

[11] The opinion is in error, and misplaces the emphasis, in concluding that the officers "followed a car in which were Buttitta, Reed and Di Re, until it was parked" at a certain place. Actually Reed had informed them of "his appointment to meet Buttitta at the Deco stand, and the incident happened at the appointed time and place." The testimony of the officers shows that, while they had recognised the car earlier at a street stop light, they did not see the actual occupants until they again came upon it while it was already parked at the curb at the Deco stand.

Arrest without a Warrant by a Peace Officer in New York, 21 N. Y. U. L. Q. Rev. 61. How far this decision departs from traditional concepts is shown, for example, by such a leading case as Burns v. Erben, 40 N. Y. 463, 470, where the arrest of a visitor to a house where silver had been stolen from the basement was justified because she was the only nonmember of the family to be in the house at the time. And Woodruff, J., after analyzing the early precedents to justify the result, says that while innocent parties "may sometimes be subjected to inconvenience and mortification," yet "any more lax rules would be greatly dangerous to the peace of the community and make the escape of criminals frequent and easy," and quotes Lord Mansfield that a different rule would be "a terrible thing." See also Perkins, The Law of Arrest, 25 Iowa L. Rev. 201, 233; Beckwith v. Philby, 6 69 Barn. & C. 635, 108 Eng. Rep. 585; Samuel v. Payne, 1 Doug. 359, 99 Eng. Rep. 230; United States v. Strickland, D. C. W. D. S. C., 62 F. Supp. 468 (involving gasoline ration coupons in an automobile); and our own weaker case of United States v. Heitner, 2 Cir., 149 F. 2d 105, 106, certiorari denied, Cryne v. United States, 326 U. S. 727, where we said that "the 'reasonable cause' necessary to support an arrest cannot demand the same strictness of proof as the accused's guilt upon a trial, unless the powers of peace officers are to be so cut down that they cannot possibly perform their duties."

Of course, the test here is the normal and appropriate reactions of police officers, not the more sophisticated after rationalizations of a judge in his chambers. True, a judge, particularly an intermediate judge, cannot be insensitive to a present strong trend toward special care and consideration in criminal prosecutions, perhaps even more so where the guilt of the accused is clear. This is surely understandable in the case of many important crimes as a reasonable, even if quixotic, demonstration to a world calloused to brutality of the beneficent contrast afforded by the American spirit of fair play. But it has less desirable consequences in the enforcement of regulatory legislation, where our undisciplined individualism makes even so desirable a war measure as the conservation of gasoline resented and thw rted all too often. Here so gigantic was the task of enforcement, so few the number of federal enforcing authorities, that a breakdown of the law must inevitably have occurred unless the cooperation of local police officers was assured. Anyone who has worked at law enforcement—particularly in smaller communities, where cause and effect are more quickly and surely traced—knows how a lack of support from the agencies higher up is accepted as a legitimate excuse for weariness or laxity of the officers on the street. That does not excuse illegality. It does suggest that a decision which

must operate as a limiting direction to the police should carry conviction of its own accommodation to the realities of everyday life and the practical thinking of ordinary persons, lest it discourage honest effort at necessary policing. I venture to believe that, given a few restrictive and ununderstood decisions of this nature, the local police would be led to leave the federal men to their own more polite means of and attempts at law enforcement.

I may add that I am troubled, too, at the disposition made of the procedural point presented by the absence of timely motion for the suppression of the exhibits here. Perhaps it should always be overlooked, but certainly much has been made of it in our own and other cases. Thus, see United States v. Salli, 2 Cir., 115
70 F. 2d 292, followed in Rose v. United States, 9 Cir., 149 F. 2d 755; 8 Wigmore on Evidence, 3d ed. 1940, Sec. 2184, p. 31. If ever applicable, it would seem so here, where the defense was known and available to defendant from the beginning and its use might at once have stopped all proceedings, including, of course, the much later jury trial. I had supposed it well settled that when a trial judge made a decision without stating his rationalizations, that decision was to be affirmed on any legal ground which existed. Here, after a brief colloquy from counsel, the judge merely said: "I will receive them." Had Rule 41 (e) Fed. Rules Cr. Proc., been then in effect. I think we must surely have affirmed, for that makes the motion before trial the normal thing, unless the judge rules otherwise.

In United States Circuit Court of Appeals, Second Circuit

UNITED STATES, PLAINTIFF-APPELLEE

v.

MICHAEL DI RE, DEFENDANT-APPELLANT

Appeal from the District Court of the United States for the Western District of New York

Judgment

Filed Feb. 3, 1947

This cause came on to be heard on the transcript of record from the District Court of the United States for the Western District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

ALEXANDER M. BELL, *Clerk.*

[File endorsement omitted.]

71 In the United States Circuit Court of Appeals for the Second Circuit

[Title omitted.]

Motion for leave to file petition for rehearing out of time

Filed March 14, 1947

Comes now the United States, by its attorneys, Theron L. Caudle, Assistant Attorney General, George L. Grobe, United States Attorney, and Michael J. McMorrow, Assistant United States Attorney, and moves the Court for leave to file out of time a petition for rehearing of the Court's decision in this case, rendered February 3, 1947. The decision did not come to the attention of the Department in Washington in time to permit thorough consideration of further steps to be taken in the case, including the advisability of filing a petition for rehearing, within the period allowed by the rules of this Court for such a petition. The Department's study of the record, briefs, and decision indicates that the question of the validity of the search of appellant was deemed to turn on the validity of his arrest, and there was not presented to the Court—and consequently the Court did not consider—the question whether the search was a valid one under the doctrine of Carroll v. United States, 267 U. S. 132, on the theory that the officers had probable cause to believe that the car or its occupants were carrying contraband, i. e., counterfeit gasoline ration coupons. Under this doctrine, the right of search does not depend upon the right to make a prior arrest. The Government desires to develop this proposition in a petition for rehearing.

It is respectfully requested, therefore, that this Court grant the Government leave to file a petition for rehearing. Since such petition will be prepared and printed in Washington, it is requested that the time for filing it be extended to and including March 17, 1947.

Respectfully submitted.

THERON L. CAUDLE,
Assistant Attorney General.
GEORGE L. GROBE,
United States Attorney.
MICHAEL J. MCMORROW,
Assistant United States Attorney.

72 [File endorsement omitted.]

In United States Circuit Court of Appeals for the Second Circuit

UNITED STATES, APPELLEE

v.

MICHAEL DIRE, APPELLANT

Before L. HAND, SWAN, and CLARK, Circuit Judges

Theron L. Caudle, for the petitioner.

On petition for rehearing

PER CURIAM: Conceding for argument that the excuse for the delay is sufficient, upon the merits we hold that the doctrine of Carroll v. United States, 267 U. S. 132, did not justify the arrest of DiRe.

L. H.
T. W. S.
C. E. C. but reserving, however, the grounds I took previously.

Dated March 14, 1947.
Filed March 14, 1947.
[File endorsement omitted.]

In United States Circuit Court of Appeals, Second Circuit

UNITED STATES, PLAINTIFF-APPELLEE

v.

MICHAEL DIRE, DEFENDANT-APPELLANT

Order

Filed March 14, 1947

A motion having been made herein by counsel for appellee to file a petition for rehearing out of time, on the question of the validity of the arrest,

73 Upon consideration thereof, it is

Ordered that the doctrine of Carroll v. United States, 267 U. S. 132 did not justify the arrest of DiRe.

ALEXANDER M. BELL, *Clerk.*

[File endorsement omitted.]
[Clerk's certificate to foregoing transcript omitted in printing.]

Supreme Court of the United States

No. —, October Term, 1946

UNITED STATES OF AMERICA, PETITIONER

vs.

MICHAEL DIRE

Order extending time

Upon consideration of the application of counsel for the petitioner,

It is ordered that the time for filing petition for certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 4th, 1947.

ROBERT H. JACKSON,
Associate Justice of the Supreme Court of the United States.

Dated this 5th day of March 1947.

74 Supreme Court of the United States

Order allowing certiorari

Filed May 19, 1947

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Douglas took no part in the consideration or decision of this application.

U. S. GOVERNMENT PRINTING OFFICE: 1947

FILE COPY

APR 2 1947
CHARLES ELMORE CROPLEY
CLERK

No. 1193, 61

In the Supreme Court of the United States

OCTOBER TERM, 1946

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL DIRE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statement	2
Specification of errors to be urged	5
Reasons for granting the writ	5
Conclusion	11

CITATIONS

Cases:

Carroll v. *United States*, 267 U. S. 132	6, 10
Cassidy v. *United States*, 49 F. 2d 504	8
Coupe v. *United States*, 113 F. 2d 145, certiorari denied, 310 U. S. 651	8, 9
Hawthorne v. *United States*, 37 F. 2d 316	11
Husty v. *United States*, 282 U. S. 694	6
Kaiser v. *United States*, 60 F. 2d 410, certiorari denied, 287 U. S. 654	11
Matthews v. *Correa*, 135 F. 2d 534	8
Scher v. *United States*, 305 U. S. 251	7
Slobble v. *United States*, 91 F. 2d 69	7
United States v. *Stafford*, 296 Fed. 702	11
United States v. *Wiggins*, 22 F. 2d 1001	11

73646—47

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1193

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL DIRE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Acting Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, reversing the conviction of respondent on the ground that counterfeit ration coupons introduced in evidence against him were obtained as the result of an unlawful search.

OPINIONS BELOW

The majority and dissenting opinions in the circuit court of appeals (R. 64–70) are not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered February 3, 1947 (R. 70), and rehearing was denied March 14, 1947 (R. 72). On March 5, 1947, the Government's time to file a petition for a writ of certiorari was extended by order of Mr. Justice Jackson to April 4, 1947.[1] The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a) of the Federal Rules of Criminal Procedure.

QUESTION PRESENTED

Whether, when officers have been informed that contraband is to be transferred at a certain place, and their observations reasonably justify the conclusion that a transfer has taken place in an automobile at such place, they are justified in searching and arresting a third person present in the automobile about whom they had no previous information.

STATEMENT

Respondent was convicted in the United States District Court for the Western District of New York on an indictment in one count charging him

[1] The extension of time to file a petition for a writ of certiorari was requested because the Government's application for rehearing was made beyond the period fixed by the rules of the Circuit Court of Appeals for the Second Circuit. However, the denial of that application was on the merits.

with knowingly possessing a quantity of counterfeit gasoline ration coupons (R. 4–5, 56). He was sentenced to imprisonment for one year and to pay a fine of $100; execution of the fine was suspended (see R. 57). On appeal to the Circuit Court of Appeals for the Second Circuit, the judgment was reversed on the ground that counterfeit ration coupons introduced in evidence against respondent were obtained as the result of an unlawful search (R. 64–67, 70). Judge Clark dissented (R. 67–70).

Respondent did not move before trial to suppress the coupons, which had been taken from his person. However, at the trial, when the coupons were offered in evidence in the course of the testimony of a detective of the Buffalo Police Department as to the circumstances under which the coupons were obtained, respondent moved to exclude them on the ground that his arrest and search were illegal (R. 8–10). Government counsel suggested that a preliminary examination would be out of order until the witness had concluded his testimony (R. 9–10). The detective and an O. P. A. investigator who accompanied him testified as to the circumstances under which respondent had been searched (R. 10–28). Thereafter, the trial judge dismissed the jury and heard argument on the admissibility of the coupons (R. 29). No question was raised as to the timeliness of the motion to suppress, but both sides

argued the validity of the search (R. 29–31). The trial judge ruled that he would admit the coupons in evidence (R. 31–32).

The circumstances under which the coupons were obtained, as developed by the testimony of the detective and the O. P. A. investigator, may be summarized as follows:

A man named Reed informed the investigator that one Buttitta was to sell him ration coupons at a place known as the Deco Stand (R. 13, 23). The investigator and the detective caught sight of Buttitta's car, followed it, and some minutes later saw it parked at the Deco Stand (R. 13, 23). They approached the car and found Buttitta in the driver's seat, respondent beside him, and Reed in the back seat (R. 7, 13). Reed had two coupons in his hand (R. 7, 14, 23), which at the trial were shown to be counterfeit (R. 23, 38). Reed said the coupons had been given to him by Buttitta (R. 7, 14, 23). The detective felt the outside of the clothing of all three men to see if they carried weapons (R. 14, 24), and then took all three to the police station (R. 8, 15, 24). The detective testified that he took respondent to the station "for questioning about the stamps" (R. 15). At the station, respondent was told to lay his possessions on the table, and he then produced two gasoline ration coupons and several fuel oil coupons, stating that he had found them on the street (R. 8–9, 19, 24). Respondent was "booked" about two hours later, and then thor-

oughly searched, at which time an envelope containing 100 inventory gasoline ration coupons was found concealed between his shirt and underwear (R. 10–11, 21–22). Both the two gasoline coupons first produced and the 100 coupons found in the envelope proved to be counterfeit (R. 9–10, 11, 38).

The majority of the circuit court of appeals held that respondent's presence in the car did not constitute probable cause for believing that he was a party to the conspiracy between Buttitta and Reed, and hence that there was no probable cause for his arrest and for the search of his person incident to such arrest (R. 64–67).

SPECIFICATION OF ERRORS TO BE URGED

The circuit court of appeals erred:

(1) In holding that the counterfeit ration coupons were inadmissible in evidence.

(2) In holding that the police officer did not have probable cause to search respondent's person when he was found in a vehicle used to carry contrabrand.

(3) In holding that there was insufficient probable cause for the arrest of respondent.

(4) In reversing the judgment of conviction.

REASONS FOR GRANTING THE WRIT

The action of the police officer in taking respondent to the station after he had been found in a car used as a rendezvous for the commission of a crime, searching him, and holding him

after he was found to be carrying a quantity of counterfeit ration coupons was, we submit, a reasonable, precautionary, law enforcement measure. And since the legality of a search or of an arrest depends, essentially, on its reasonableness, the result reached in the decision below, in labelling as unreasonable measures reasonable on their face, in itself casts doubts on the validity of the reasoning underlying the decision. It is our position that the search of respondent may be justified on two grounds—either as incident to a search of a vehicle reasonably believed to be carrying contrabrand, or as incident to a valid arrest—and that, in holding the search unreasonable, the court below disregarded controlling decisions of this Court in a manner which will unduly hamper law enforcement officers.

1. As we pointed out in our petition for rehearing in the court below (R. 71), the search of respondent may be justified, without regard to the validity of his arrest, under the principle enunciated by this Court in *Carroll* v. *United States*, 267 U. S. 132, and *Husty* v. *United States*, 282 U. S. 694, that a vehicle may be searched by officers having reasonable cause to believe that it is being used to carry contrabrand.

In the instant case, the undisputed facts establish that the officer who searched respondent had reasonable cause to believe that the automobile in which he was found was being used to carry contraband—counterfeit gasoline ration coupons.

Hence, under the cases cited, the officer had a right to stop and search the car. The right to search was not lost merely because the car was stationary at the time the officer approached it. *Scher* v. *United States*, 305 U. S. 251, 255.

Since, therefore, a search of the car would clearly have been proper, a search of the occupants of the car was, we submit, also proper under the circumstances of this case. We have found no authority dealing specifically with the question of the right to search the occupants of a car thought to be carrying contraband, but common sense demands that such right exist in a case such as this where the contraband sought is a small article which could easily be concealed on the person. We do not suggest that where officers have information that a vehicle is being used to carry gallon jugs, they may justify a search of an individual's pockets on such ground without a valid arrest of the person. But where, as here, the contraband sought is of such a nature that it could easily be concealed on the person, could even be slipped into the pockets of a passenger in the car without his knowledge, then a right to search the automobile without a right to search the occupants of the automobile would very frequently be meaningless. Reported decisions have assumed, without discussion, that the right to stop and search an automobile includes the right to take contraband from a person in the car. See *Stobble* v. *United States*, 91 F. 2d 69, 70 (C. C. A. 7),

where an envelope believed to contain heroin was taken from the defendant while she was sitting in a parked car; *Cassidy* v. *United States*, 49 F. 2d 504, 505 (App. D. C.), where a pint bottle of liquor was taken from the defendant's hip pocket at the time his car was searched. While, in both these cases, the persons from whom the contraband was taken were subject to arrest, the taking of the articles was treated in the decisions as part of the search of the vehicle. Considering the nature of the offending instruments sought in the instant case, we submit that the officer had the right to search the occupants of the automobile as well as the automobile itself.

The fact that the search of appellant's person was conducted at the station house rather than at the place where the car was parked does not, we think, affect its validity under the foregoing principles. If the officer had a right to search at all, he had a right to make as thorough a search as was necessary to uncover the type of contraband sought. Cf. *Matthews* v. *Correa*, 135 F. 2d 534, 537 (C. C. A. 2). And, manifestly, a public street is not a place in which a thorough search of a person's clothing can reasonably be conducted. It was therefore reasonable, and by the same token proper, to take the occupants of the automobile to a place where the search of their persons could be conducted effectively. In *Coupe* v. *United States*, 113 F. 2d 145 (App. D. C.), certiorari denied, 310 U. S. 651, officers who

had reason to believe that an automobile was being used to carry policy slips took the car to police headquarters before searching it (see 113 F. 2d at p. 146). Their right to do so was assumed in an opinion by Mr. Justice Rutledge. So here, the automobile and its occupants could properly have been taken to headquarters and there searched. That the occupants alone were taken without the car does not seem to us a factor of importance in determining the validity of the search.

2. Even if it be deemed necessary to justify the search of respondent at the police station on the basis of a valid arrest, then, we submit, for the reasons set forth in the dissenting opinion below (R. 67–70), probable cause existed for the arrest. As Judge Clark stated in his dissent, "Police officers cannot be held unreasonable in declining to view as a mere by-stander one who accompanies a criminal to a crime rendezvous" (R. 67).

Although giving lip service to the recognized rule that the test of the legality of an arrest is whether the arresting officer has reasonable cause to believe that a felony has been committed and that the person arrested has committed it, the majority of the court below actually applied a test which would be appropriate in determining guilt or innocence at a trial. The rule of substantive guilt—that mere knowledge is not sufficient to establish membership in a conspiracy—does not seem to us to require a holding that

police officers are not justified in assuming that a person present at a pre-arranged rendezvous for the commission of a crime has some complicity in the venture, either as a co-conspirator, or as an aider and abettor. This Court has frequently reiterated the rule that actual guilt need not be established to show probable cause, that it is sufficient if the officer acts upon reasonable grounds to believe that the person arrested is guilty of an offense. *Carroll* v. *United States*, 267 U. S. 132, 161, and cases there cited. These decisions were disregarded by the court below in applying to the validity of the arrest the standards of substantive guilt.

The effect of the decision below is to place a wholly unreasonable burden on law enforcement officers. In actual practice, it frequently happens that officers receive information as to planned meetings for the perpetration of crime in which only one or two of the participants are identified. It is unrealistic to hold that others present at the scene but not theretofore identified are immune from arrest. This is particularly true in liquor and narcotics cases, where agents often receive information merely that a certain automobile will be carrying the contraband at a particular time. Surely, when a car is stopped and found to be carrying contraband liquor or narcotics, the agents have reasonable basis for arresting all the occupants of the car. Decisions in cases involving such factual situations have

assumed without question the validity of such arrests. *Kaiser* v. *United States*, 60 F. 2d 410 (C. C. A. 8), certiorari denied, 287 U. S. 654; *Hawthorne* v. *United States*, 37 F. 2d 316 (C. C. A. 4); *United States* v. *Wiggins*, 22 F. 2d 1001 (D. Minn.); *United States* v. *Stafford*, 296 Fed. 702 (E. D. Ky.). Under the decision below, however, unless the arresting officers have information identifying the persons involved, they would have no basis for arresting persons other than the driver. Such a holding, we submit, invites major criminals to avoid arrest by the simple expedient of having an employee drive the automobile.

CONCLUSION

The decision below is contrary to established principles governing the search of motor vehicles and the arrest of persons reasonably believed to have committed a crime. It can, we believe, prove of serious embarrassment to law enforcement officers in important fields of Federal criminal jurisdiction. We therefore respectfully submit that the petition for a writ of certiorari should be granted.

GEORGE T. WASHINGTON,
Acting Solicitor General.

APRIL 1947.

U. S. GOVERNMENT PRINTING OFFICE: 1947

FILE COPY

Office - Supreme Court, U. S.
FILED
AUG 4 1947
CHARLES ELMORE CROPLEY
CLERK

No. 61

In the Supreme Court of the United States

OCTOBER TERM, 1947

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL DI RE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Constitutional provision and statutes involved	2
Statement	4
Specification of errors to be urged	7
Summary of argument	7
Argument	11
I. The search of respondent was justified as incident to a lawful arrest	13
II. Alternatively the search of respondent was justified as incident to the search of a moving vehicle reasonably believed to be carrying contraband	25
Conclusion	29

CITATIONS

Cases:	
Agnello v. *United States*, 269 U. S. 20	13
Andrews v. *United States*, 157 F. [illegible] certiorari denied, February 17, 1947, No. 881, Oct. T. 1946	15
Sir Anthony Ashley's Case, 12 Coke 90	20
Banning v. *United States*, 130 F. 2d 330, certiorari denied, 317 U. S. 695	20
Beard v. *United States*, 82 F. 2d 837, certiorari denied, 298 U. S. 655	20, 22
Bilokumsky v. Tod, 263 U. S. 149	24
Brady v. *United States*, 300 Fed. 540, certiorari denied, 266 U. S. 620	17
Carroll v. *United States*, 267 U. S. 132	8, 10, 13, 17, 18, 25, 26
Cassidy v. *United States*, 49 F. 2d. 504	27
Coupe v. *United States*, 113 F. 2d 145, certiorari denied, 310 U. S. 651	28, 29
Davis v. *United States*, 328 U. S. 582	13
Direct Sales Co. v. *United States*, 319 U. S. 703	14
Dumbra v. *United States*, 268 U. S. 435	9, 19
Earl v. *United States*, 4 F. 2d 532	26
Gambino v. *United States*, 275 U. S. 310	14
Harris v. *United States*, No. 34, Oct. T. 1946, decided May 5, 1947	13, 27
Hawthorne v. *United States*, 37 F. 2d 316	22
Holley v. *Mix*, 3 Wend. (N. Y.) 350	17
Husty v. *United States*, 282 U. S. 694	19, 25
Kaiser v. *United States*, 60 F. 2d 410, certiorari denied, 287 U. S. 654	22

Cases—Continued.	Page
Kanner v. *United States*, 34 F. 2d 883	20
Leong Chong Wing v. *United States*, 95 F. 2d 908	25
Marsh v. *United States*, 29 F. 2d 172	14
Minner v. *United States*, 57 F. 2d 506	20
People v. *Chiagles*, 237 N. Y. 193	13
Scher v. *United States*, 305 U. S. 251	10, 26
Stacey v. *Emery*, 97 U. S. 642	18
State v. *Hatfield*, 112 W. Va. 424	22
Stobble v. *United States*, 91 F. 2d 69	26, 27
Testa v. *Katt*, No. 431, Oct. T. 1946, decided March 10, 1947	13
United States v. *Falcone*, 311 U. S. 205	14
United States v. *Hannon*, 105 F. 2d 390, certiorari denied, 308 U. S. 594	20
United States v. *Lindenfeld*, 142 F. 2d 829, certiorari denied, 323 U. S. 761	17
United States v. *Mullin*, 51 F. Supp. 785	15
United States v. *One Packard Truck*, 55 F. 2d 882	14
United States v. *Raskin*, 52 F. Supp. 343	15
United States v. *Serpico*, 148 F. 2d 95	15
United States v. *Simonds*, 148 F. 2d 177	14
United States v. *Stafford*, 296 Fed. 702	22
United States v. *Valenti*, 134 F. 2d 362, certiorari denied 319 U. S. 761	20
United States v. *Wiggins*, 22 F. 2d 1001	22
Weeks v. *United States*, 232 U. S. 383	13
Woodward, In re, 1 F. 2d 672	22
Constitutional Provision and Statutes Involved:	
Fourth Amendment	2
Criminal Code, Section 28, 18 U. S. C. 72	3, 15
Criminal Code, Section 37, 18 U. S. C. 88	3
Second War Powers Act, 1942 (50 U. S. C. App., Supp V, (633), Section 301	4
New York Code of Criminal Procedure, Section 177	4, 15
Miscellaneous:	
5 U. S. C. 300a	16
18 U. S. C. 53a	16
American Law Institute, *Code of Criminal Procedure*	16
Comment (1932) 30 Mich L. Rev. 1288	17
Hale, *Pleas of the Crown*, Vol. 2, p. 81	21
Hawkins, *Pleas of the Crown*, Vol. 2, c. 12, Sec. 11	21
Perkins, *Law of Arrest* (1940) 25 Iowa L. Rev. 201	29
Waite, *Public Policy and the Arrest of Felons* (1933) 31 Mich. L. Rev. 749	15, 17, 18
Waite, *Some Inadequacies in the Law of Arrest* (1931) 29 Mich. L. Rev. 448	17
Wilgus, *Arrest Without a Warrant* (1924) 22 Mich L. Rev. 673	15, 18

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 61

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL DI RE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The majority and dissenting opinions in the circuit court of appeals (R. 41–47) are reported at 159 F. 2d 818.

JURISDICTION

The judgment of the circuit court of appeals was entered February 3, 1947 (R. 47), and a petition for rehearing was denied March 14, 1947 (R. 49). On March 5, 1947, the Government's time to file a petition for a writ of certiorari was extended by order of Mr. Justice Jackson to April

4, 1947 (R. 50).[1] The petition for a writ of certiorari was filed April 2, 1947, and was granted May 19, 1947 (R. 50). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTION PRESENTED

Whether, when officers have been informed that contraband is to be transferred at a certain place, and their observations reasonably justify the conclusion that the transfer has occurred in an automobile at such place, they are justified in searching and arresting a third person present in the automobile about whom they had no previous information.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fourth Amendment to the Constitution provides—

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[1] The extension of time to file a petition for a writ of certiorari was requested because the Government's application for rehearing was made beyond the period fixed by the rules of the Circuit Court of Appeals for the Second Circuit. However, the denial of that application was on the merits.

Section 37 of the Criminal Code, 18 U. S. C. 88, provides—

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

Section 28 of the Criminal Code, 18 U. S. C. 72, provides—

> Whoever shall falsely make, alter, forge, or counterfeit, or cause or procure to be falsely made, altered, forged, or counterfeited, or willingly aid or assist in the false making, altering, forging, or counterfeiting, any bond, bid, proposal, contract, guarantee, security, official bond, public record, affidavit, or other writing for the purpose of defrauding the United States; or shall utter or publish as true, or cause to be uttered or published as true, or have in his possession with the intent to utter or publish as true, any such false, forged, altered, or counterfeited bond, bid, proposal, contract, guarantee, security, official bond, public record, affidavit, or other writing, for the purpose of defrauding the United States, knowing the same to be false, forged, altered, or counterfeited; or shall transmit to, or present at, or cause or procure to be transmitted to or presented at, the office of any officer of the United States, any such false, forged, altered, or

> counterfeited bond, bid, proposal, contract, guarantee, security, official bond, public record, affidavit, or other writing, knowing the same to be false, forged, altered, or counterfeited, for the purpose of defrauding the United States, shall be fined not more than $1,000 or imprisoned not more than ten years, or both.

Section 177 of the New York Code of Criminal Procedure provides—

> A peace officer may, without a warrant, arrest a person,
>
> 1. For a crime, committed or attempted in his presence;
>
> 2. When the person arrested has committed a felony, although not in his presence;
>
> 3. When a felony has in fact been committed, and he has reasonable cause for believing the person to be arrested to have committed it.

STATEMENT

Respondent was indicted on one count, in the United States District Court for the Western District of New York, for knowingly possessing a quantity of counterfeit gasoline ration coupons (R. 3, 36), in violation of Section 301 of the Second War Powers Act, 1942 (50 U. S. C. App., Supp. V, 633). At his trial, the following facts were developed in evidence:

O'Donnell, an O. P. A. investigator, was informed by a man named Reed that one Buttitta.

was to sell Reed counterfeit gasoline ration coupons at a place in Buffalo, N. Y., known as the Deco Stand (R. 8, 15). O'Donnell and Gross, a detective of the Buffalo Police Department, caught sight of Buttitta's car, followed it, and some minutes later saw it parked at the Deco Stand (R. 8–9, 15). They approached the car and found Buttitta in the driver's seat, respondent beside him, and Reed in the back seat (R. 5, 9). Respondent was dressed in working clothes (R. 14). Reed had two coupons in his hand (R. 5, 9, 15), which at the trial were shown to be counterfeit (R. 15, 24, 25). Reed said the coupons had been given to him by Buttitta (R. 5, 9, 15). Detective Gross felt the outside of the clothing of all three men to see if they carried weapons (R. 9, 15), and then all three men were taken to the police station (R. 5, 10, 15–16). At the station, respondent was told to lay his possessions on the table, and he then produced two gasoline ration coupons and several fuel oil coupons, stating that he had found them on the street (R. 6, 13, 16). When questioned, he said that he met Buttitta when he finished work and that Buttitta asked him to go for a ride; that the coupons had been given to him (R. 16). Respondent was "booked" about two hours later, and was then thoroughly searched. At that time an envelope containing 100 inventory gasoline ration coupons was found concealed between his shirt and underwear (R. 7, 14). Both the two

gasoline coupons first produced and the 100 coupons found in the envelope proved to be counterfeit (R. 6, 7, 24–25).

Respondent did not move before trial to suppress the coupons which had been taken from his person. However, at the trial, when the coupons were offered in evidence in the course of Detective Gross's testimony as to the circumstances under which they were obtained, respondent moved to exclude them on the ground that his arrest and search were illegal (R. 5–6). Government counsel suggested that a preliminary examination would be out of order until the witness had concluded his testimony (R. 6). Detective Gross and the O. P. A. investigator, O'Donnell, testified as to the circumstances under which respondent had been searched (R. 7–19). Thereupon, the trial judge excused the jury and heard argument on the admissibility of the coupons (R. 19). No question was raised as to the timeliness of the motion to suppress, but both sides argued the validity of the search (R. 19–20). The trial judge ruled that he would admit the coupons in evidence (R. 20).

The jury found respondent guilty, and he was sentenced to imprisonment for one year and to pay a fine of $100; execution of the fine was suspended (see R. 37). On appeal to the Circuit Court of Appeals for the Second Circuit, the judgment was reversed (R. 47) on the ground that the counterfeit ration coupons introduced in evi-

dence against respondent were obtained as the result of an unlawful search (R. 41–44). The majority of the circuit court of appeals held that respondent's presence in the car did not constitute probable cause for believing that he was a party to the conspiracy between Buttitta and Reed, and hence that there was no probable cause for his arrest and for the search of his person incident to such arrest (R. 41–44). Judge Clark dissented (R. 44–47), essentially on the ground that "police officers cannot be held unreasonable in declining to view as a mere bystander one who accompanies a criminal to a crime rendezvous" (R. 44–45).

SPECIFICATION OF ERRORS TO BE URGED

The circuit court of appeals erred:

(1) In holding that the counterfeit ration coupons were inadmissible in evidence.

(2) In holding that the police officer did not have probable cause to search respondent's person when he was found in a vehicle used to carry contraband.

(3) In holding that there was insufficient probable cause for the arrest of respondent.

(4) In reversing the judgment of conviction.

SUMMARY OF ARGUMENT

When the police officer found that respondent had been brought in an automobile by known conspirators to the place previously arranged for the transfer of counterfeit ration coupons, he was justified in taking respondent to the station house

and searching him there. His action was reasonable, either as a search of the person incident to a valid arrest, or as incident to the search of a moving vehicle believed to be carrying contraband.

I

If respondent's arrest was lawful, then the search of his person as an incident of the arrest was lawful also.

Respondent's arrest was legal under the second clause of Sec. 177 of the New York Code of Criminal Procedure because, being in possession of counterfeit ration coupons, he had in fact committed a felony, though not in the presence of the officer.

In any event, there was probable cause for the officer to believe that respondent was implicated in felonies which had been committed. The agreement between Buttitta and Reed to transfer counterfeit ration coupons and bring about their possession by Reed was a conspiracy and thus a felony. The transfer of the coupons by Buttitta to Reed pursuant to that conspiracy and their possession by Reed were also felonies. These felonies had in fact been committed and the arresting officer had reasonable cause to believe that they had been committed. Hence, he had the right to arrest any person reasonably believed to be implicated in those felonies. *Carroll* v. *United States*, 267 U. S. 132, 156.

This Court has emphasized that actual guilt need not be established to show probable cause, that it is sufficient if the officer acts as a reasonably prudent man. *Dumbra* v. *United States*, 268 U. S. 435, 441. The fundamental error in the decision of the majority below is that, in determining the validity of the arrest of respondent, it misapplies the rule of substantive guilt that mere knowledge of a conspiracy is not sufficient to establish guilt as a conspirator. Even at a trial, proof of association with known conspirators and proof of presence at the time of the commission of an overt act are relevant facts to be considered in determining whether a particular individual has participated in the conspiracy. For at least three centuries the presence of a person at the time of the commission of an offense has been considered sufficient probable cause for his arrest. Such a rule is based on a simple fact of human conduct, i. e., that criminals are not prone to arrange to have disinterested third parties present to witness their crimes.

Here petitioner was deliberately brought by known conspirators to a place previously arranged for the commission of a felony. When approached by the police officers he made no protestation of innocence and made no explanation for his conduct. The police officers were, therefore, justified in concluding that he was implicated in the crime just committed.

II.

The undisputed facts established that the vehicle in which respondent was found was being used to transport contraband, i.e., counterfeit ration coupons. Hence, the officer had authority to stop and search the automobile irrespective of his right to arrest the occupants of the automobile. *Carroll* v. *United States,* 267 U. S. 132, 158–159. That right was not lost merely because the vehicle had come to a stop a short time before the officers approached. *Scher* v. *United States,* 305 U. S. 251, 255.

Inasmuch as a search of the car would clearly have been proper, a search of the occupants of the car was also proper. And, since the contraband sought was a small article which could easily be concealed on the person, a right to search the car would be meaningless without a right to search the persons in the car. At the very least, the right to search the vehicle for the type of contraband here sought carried with it the right to search respondent to the extent that he was first searched at the police station when he was asked to lay his possessions on the table. Thereafter, when respondent produced two gasoline coupons with the unlikely explanation that he had found them on the street, there was ample justification for his arrest and for the more thorough search of his person as incident thereto.

The fact that this search of respondent's pockets was conducted at the station house, rather than at the place where the car was parked does not affect its validity under the foregoing principles. If there was a right to search at all, there was a right to conduct that search in a suitable place. The public street on which the automobile was found was not a place in which the search of a person's clothing could reasonably be conducted. It was therefore reasonable, and by the same token, proper, to take respondent to a place where a search of his person could be conducted effectively.

ARGUMENT

The factual situation in this case is a simple one. Police officers receive information that two persons have entered into a conspiracy to transfer contraband—i. e., property the very possession of which is a crime—at a certain time and at a certain place. At that time and at that place they observe facts justifying the conclusion that the contemplated crime, a felony, has been committed. Present at that time and in that place, in a confined area—inside an automobile—is a third person brought along by the conspirators, dressed in ordinary working clothes, who, at the time the police approach, makes no protestation of innocence and gives no explanation of his presence. The narrow question here is whether a police officer has any reasonable basis for concluding that the

third person present at the commission of the crime under such circumstance has some interest in the criminal venture, or whether he is required to treat such third person as a disinterested party who merely happened to be present at the time the crime was committed.

We think that the question answers itself; that, in the judgment of the community, a law enforcement officer would be considered derelict in his duty if he allowed such third person to depart without seeking to determine his part in the crime just committed. And, since the validity of an arrest or of a search depends, in circumstances such as are presented here, essentially upon its reasonableness, the decision below, which brands as unreasonable action by police officers which appears thoroughly reasonable on its face, achieves a result which plainly demonstrates its own unsoundness.

We believe that, on the facts presented, the action of the police officer in taking respondent to the station house and searching him there may be justified, primarily, as a search of the person of the one arrested incident to a valid arrest. Alternatively, we believe that the police action may be upheld as incident to the search of a moving vehicle reasonably believed to be carrying contraband. We submit that, on either ground, the conduct of the officers concerned was reasonable under controlling decisions of this Court.

I

THE SEARCH OF RESPONDENT WAS JUSTIFIED AS INCIDENT TO A LAWFUL ARREST

Given a lawful arrest, it is undisputed that the body and clothing of the arrested person may be subjected to search; this has been many times held by this Court, nor has the principle been disputed in any of the recent cases dealing with the precise scope of the Fourth Amendment's interdiction of "unreasonable searches and seizures." *Weeks* v. *United States,* 232 U. S. 383, 392; *Carroll* v. *United States,* 267 U. S. 132, 158; *Agnello* v. *United States,* 269 U. S. 20, 30; *Harris* v. *United States,* No. 34, Oct. T. 1946, decided May 5, 1947, pp. 5–6 of slip opinion; see *People* v. *Chiagles,* 237 N. Y. 193 (*per* Cardozo, J.); compare Franfurter, J., dissenting in *Davis* v. *United States,* 328 U. S. 582, 609–610; Jackson, J., dissenting in *Harris* v. *United States, supra,* p. 2 of slip opinion; Murphy, J., dissenting in *Harris* v. *United States, supra,* p. 4 of slip opinion.

The inquiry here, therefore—and the only inquiry—is whether respondent was lawfully arrested. We agree with Judge Clark below that he was.

Starting from the proposition that, since a statute of the United States is the supreme law of the land (cf. *Testa* v. *Katt,* No. 431, Oct. T. 1946, decided March 10, 1947), a state officer may properly arrest for commission of a federal of-

fense (*Marsh* v. *United States*, 29 F. 2d 172 (C. C. A. 2); *United States* v. *One Packard Truck*, 55 F. 2d 882, 884 (C. C. A. 2); see *Gambino* v. *United States*, 275 U. S. 310, 314–316), we turn to the bases for asserting that Detective Gross had authority to arrest respondent.

By way of preliminary, it should be noted that, as all the judges below held, the agreement between Buttitta and Reed to transfer counterfeit ration coupons and bring about their possession by Reed was a conspiracy and thus a felony.[2] It is undisputed that Detective Gross, who arrested respondent, and O'Donnell, the O. P. A. investigator who accompanied him, had reasonable cause to believe that this felony had been committed. Moreover, the felony had in fact been committed.

[2] The agreement to effectuate the transfer of property which neither the transferor nor the transferee has the right to possess under any circumstances is manifestly different from an agreement to sell to another articles which may or may not be used illegally. Hence, neither the doctrine of *United States* v. *Falcone*, 311 U. S. 205, that one does not become a conspirator by making sales to a person who intends to use them illegally, nor even the caveat in *Direct Sales Co.* v. *United States*, 319 U. S. 703, 712, that a sale of "restricted goods" may not establish a conspiracy, are applicable here. The agreement to bring about the transfer of counterfeit ration coupons was an agreement to commit an offense against the United States and thus a conspiracy under Section 37 of the Criminal Code. It should be noted, moreover, that possession of the counterfeit coupons was itself a crime, capable of being committed by the transferee alone, and hence a conspiracy to bring about that result was a distinct offense punishable independently of the substantive crime. *United States* v. *Simonds*, 148 F. 2d 177, 178 (C. C. A. 2).

Furthermore, the transfer of the counterfeit coupons by Buttitta to Reed and their possession by Reed were themselves felonies under Section 28 of the Criminal Code (18 U. S. C. 72). *United States* v. *Serpico,* 148 F. 2d 95 (C. C. A. 2); *United States* v. *Raskin,* 52 F. Supp. 343 (E. D. N. Y.); *United States* v. *Mullin,* 51 F. Supp. 785 (E. D. Mo.). See also *Andrews* v. *United States,* 157 F. 2d 723 (C. C. A. 5), certiorari denied, February 17, 1947 (No. 881, Oct. T. 1946). These felonies, too, had actually been committed, and the arresting officers had reasonable cause to believe that they had been committed. Additionally, as Judge Clark points out, under the *Serpico* case the finding of the counterfeit coupons upon the respondent shows that he also was committing a felony (R. 45).

With the foregoing by way of background, we turn to an examination of the New York statute authorizing arrests by a peace officer without a warrant.

The second subdivision of Section 177 of the New York Code of Criminal Procedure authorizes such an arrest "When the person arrested has committed a felony, although not in his presence." This subdivision covers a case where the arrested person has in fact committed a felony although the arresting officer is unaware of the fact. See Waite, *Public Policy and the Arrest of Felons* (1933) 31 Mich. L. Rev. 749; Wilgus, *Arrest Without a Warrant* (1924) 22 Mich. L.

Rev. 673, 685. A similar provision is found in the statutes of numerous states and in the American Law Institute's model Code of Criminal Procedure.[3] A federal statute looks in the same direction.[4] The obvious justification for this statutory authorization is that, without it, a person actually guilty of the most heinous felony could not be lawfully arrested if he did not appear guilty.[5] The New York statute and others

[3] "*Section 21. Arrest by officer without warrant—when lawful.* A peace officer may, without a warrant, arrest a person:

* * * * * *

"(b) When the person to be arrested has committed a felony, although not in the presence of the officer.

* * * * * *

The commentary to the model code, at pp. 234–235, lists (as of 1930–31) the statutes of seventeen states which embody this provision in substance.

[4] See the proviso to 18 U. S. C. 53a, declaring an unlawful search by any federal law enforcement officer to be a misdemeanor: "*Provided*, That nothing herein contained shall apply to any officer, agent, or employee of the United States serving a warrant of arrest, or arresting or attempting to arrest any person committing or attempting to commit an offense in the presence of such officer, agent, or employee, or who has committed, or who is suspected on reasonable grounds of having committed, a felony."

The statute authorizing members of the Federal Bureau of Investigation to make arrests does not go this far. 5 U. S. C. 300a.

[5] As one commentator put it, "The rule is that an officer may lawfully arrest even an *innocent* person when he believes and has reasonable ground to believe that person guilty of a felony. But, for some inenubilous reason, it is not the law that he may lawfully arrest a *guilty* person whom he

like it is designed to introduce more rationality into the law, particularly in the recurring instance of arrests for unlawfully carrying concealed weapons. See Waite, *Public Policy and the Arrest of Felons* (1933) 31 Mich. L. Rev. 749, *passim;* cf. *Holley* v. *Mix,* 3 Wend. (N. Y.) 350, 353. Under that statute, respondent's arrest was plainly legal.

But the officer's act can also be justified under the third subdivision of Section 177, "When a felony has in fact been committed, and he has reasonable cause for believing the person to be arrested to have committed it." This states the familiar principle repeatedly laid down in the federal cases, and which would have been applied in the absence of statute. A police officer "may arrest without warrant one believed by the officer upon reasonable cause to have been guilty of a felony" (*Carroll* v. *United States,* 267 U. S. 132, 156), i. e., he may arrest on reasonable cause to believe that a felony has been committed, and that the person arrested has committed it. If a felony has in fact been committed, either an officer or a private person may arrest anyone reasonably believed to have committed the felony. *United States* v. *Lindenfeld,* 142 F. 2d 829, 831 (C. C. A. 2), certiorari denied, 323 U. S. 761; *Brady* v. *United States,* 300 Fed. 540, 543 (C. C. A. 6), certiorari

---

suspects of felony but whom, the court opines, he had not reasonable ground to suspect." Waite, *Some Inadequacies in the Law of Arrest* (1931) 29 Mich. L. Rev. 448, 453. See also Comment (1932) 30 Mich. L. Rev. 1288.

denied, 266 U. S. 620; see Wilgus, *Arrest Without a Warrant* (1924) 22 Mich. L. Rev. 673, 685–701.

Here, therefore, Detective Gross had the right to arrest respondent if he had probable cause to believe that respondent was a party to the conspiracy between Buttitta and Reed, or that he had aided and abetted the commission of the substantive crime of possessing or transferring the counterfeit ration coupons.

The controversy in the court below turned on the existence of probable cause to entertain such belief on the basis of the circumstances proved. Here again, the general legal principles are not in dispute. The accepted definitions of probable cause are those adopted with approval from state cases by this Court in *Stacey* v. *Emery*, 97 U. S. 642, 645:

> * * * A reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the party is guilty of the offence with which he is charged.
>
> * * * Such a state of facts as would lead a man of ordinary caution to believe, or to entertain an honest and strong suspicion, that the person is guilty. * * *

Or, as this Court, again quoting a state case, said in *Carroll* v. *United States*, 267 U. S. 132, 161, "The substance of all the definitions is a reasonable ground for belief in guilt."

This Court itself has emphasized that actual guilt need not be established to show probable cause; that it is sufficient if the officer acts as a reasonably prudent man.

> To show probable cause it is not necessary that the arresting officer should have had before him legal evidence of the suspected illegal act. (*Husty* v. *United States*, 282 U. S. 694, 700–701.)
>
> In determining what is probable cause, we are not called upon to determine whether the offense charged has in fact been committed. (*Dumbra* v. *United States*, 268 U. S. 435, 441.)

The test of the validity of an arrest in other words is reasonable deduction, not proof beyond a reasonable doubt.

The fundamental error in the majority opinion below is that it tests the validity of the arrest, not by standards of reasonable deduction, but by standards of substantive guilt. The gist of the ruling of the majority below is that probable cause for respondent's arrest was not established because mere knowledge or acquiescence in a conspiracy is not sufficient to establish a person's guilt as a co-conspirator. Unquestionably, such is the rule when a jury is called upon to judge the sufficiency of all the evidence adduced at a trial for conspiracy. But, even at a trial, proof of association with known conspirators, proof of knowledge of the conspiracy, and proof of presence at the time of the commission of an overt act are

relevant facts to be considered in determining whether a particular individual has participated in the conspiracy. *United States* v. *Valenti*, 134 F. 2d 362, 363 (C. C. A. 2), certiorari denied, 319 U. S. 761; *Banning* v. *United States*, 130 F. 2d 330, 337 (C. C. A. 6), certiorari denied, 317 U. S. 695; *United States* v. *Hannon*, 105 F. 2d 390, 392 (C. C. A. 3), certiorari denied, 308 U. S. 594; *Minner* v. *United States*, 57 F. 2d 506, 510 (C. C. A. 10); *Kanner* v. *United States*, 34 F. 2d 863, 866–867 (C. C. A. 7). And proof of association may sometimes be so strong as to constitute proof of the offense. See *United States* v. *Valenti*, *supra*; *Beard* v. *United States*, 82 F. 2d 837, 844 (App. D. C.), certiorari denied, 298 U. S. 655. *A fortiori*, the concurrence of all these factors at a particular time and place is a circumstance from which a reasonable law enforcement officer could reasonably conclude that a third person, deliberately brought along by the conspirators to the place where a crime has just been enacted, is implicated in the conspiracy and the crime. As Judge Clark very properly pointed out below (R. 44–45), "Police officers cannot be held unreasonable in declining to view as a mere bystander one who accompanies a criminal to a crime rendezvous."

From early times, association with a person known to have recently committed a crime has been considered probable cause justifying arrest. Thus, in *Sir Anthony Ashley's Case*, 12 Coke 90

(1612), one of the first cases to formulate the rule governing the right of private persons to make an arrest, it was said (p. 92):

> And in this case it was resolved, that if felony be done, and one hath suspicion upon probable matter that another is guilty of it, because that he had part of the goods robbed, and is indigent, or if the party be indicted, or if murder be committed, and one is seen near the place, or coming with a sword or other weapon embrued with blood, *or that he was in company of felons,* or hath carried the goods stolen to obscure places, or such like things, these are good causes of suspicion; and by reason of this he may arrest the party so suspected, to the end that he may subject him to justice. [Italics added].

Hale in his *Pleas of the Crown,* written in the second half of the Seventeenth Century, in discussing the right of private persons to make an arrest mentions, among other grounds justifying arrest, the fact that the person arrested is "party with him that committed the robbery" (vol. 2, p. *81). In the following century, Hawkins (2 *Pleas of the Crown,* c. 12, § 11) lists as good probable cause for arrest "the being in company with one known to be an offender, at the time of the offence."

Until the decision below, it had been assumed as a matter of course, in more modern cases, that when several persons are found together at the

place where a crime has just been committed, all persons so found are subject to arrest. Certainly no one would suppose that a person brought along by a bank robber at the time of the robbery was there merely to enjoy the spectacle. Men found near a still in ordinary working clothes are regularly arrested on the assumption that they have some connection with the operation of the still, although conceivably their presence might be otherwise explained. It has been held that men apparently at ease in an establishment where bets were known to have been taken were not only justifiably arrested, but justly convicted of conspiracy to operate the establishment. *Beard* v. *United States*, 82 F. 2d 837, 844 (App. D. C.), certiorari denied, 298 U. S. 655. In liquor and narcotics cases, it frequently happens that officers receive information merely that a certain automobile will be carrying contraband at a particular time. When the car is stopped and found to be carrying liquor or narcotics, all persons in the car are regularly arrested. The validity of such arrests has been assumed without question in reported decisions. *Kaiser* v. *United States*, 60 F. 2d 410 (C. C. A. 8), certiorari denied, 287 U. S. 654; *Hawthorne* v. *United States*, 37 F. 2d 316 (C. C. A. 4); *United States* v. *Wiggins*, 22 F. 2d 1001 (D. Minn.); *In re Woodward*, 1 F. 2d 672 (W. D. N. Y.); *United States* v. *Stafford*, 296 Fed. 702 (E. D. Ky.); and see *State* v. *Hatfield*, 112 W. Va. 424 (1932), where four men were arrested when

one threw out a pistol. Yet, under the decision below, since mere presence in a car at the time of the commission of a crime is not a sufficient circumstance from which to infer participation in the crime, officers who stop a car carrying contraband would be justified in arresting only the driver of the car. Such a ruling could, we submit, lead to absurd results. It would invite the leader of a criminal venture to endeavor to avoid arrest by the simple expedient of always having an employee drive his car or effect the actual transfer of the contraband. And if it be said that the rule below is limited to situations where particular individuals have been previously identified, and does not apply to situations where no participants have been specified, the results would still be absurd, for such a holding would enable accomplices to throw suspicion on a minor employee and make arrest of the major offender more difficult.

The majority of the court below neglected to take into consideration one simple fact of human conduct implicitly recognized for at least three centuries, i. e., that criminals are not prone to arrange to have disinterested third parties present to witness their crimes. Common experience shows this to be true. It cannot be overemphasized in this case that respondent is not a person who could have been present at the time of the commission of the crime without a prior design on the part of the known conspirators to

bring him there, and that he was brought by them to the very place arranged for the commission of a previously conceived crime. Police officers, faced with the necessity of taking immediate action to deal with a recently committed crime, are entitled, we submit, to make their decisions on the basis of normal human conduct, and are not required to conjure up unlikely possibilities which might, in a rare case, account for the fact that an innocent person has been brought by criminals to the scene of the crime. Their decision to treat the third person as one implicated in the crime is particularly justified where, as here, that third person makes no protestation of innocence and attempts no explanation for his presence until some time after he has been arrested. As this Court said in *Bilokumsky* v. *Tod*, 263 U. S. 149, 153:

> Conduct which forms a basis for inference is evidence. Silence is often evidence of the most persuasive character.

Arrest, after all, is not conviction. More latitude in the drawing of inferences from circumstances must be accorded to an officer making an arrest than would be allowed a jury in determining guilt. It is a reasonable inference that one brought by criminals to the place previously arranged for the commission of a preconceived crime is implicated in the crime. Considering all the circumstances, therefore, we submit that the police officer had probable cause for the arrest

of respondent and for the search of his person as incident thereto.

II

ALTERNATIVELY, THE SEARCH OF RESPONDENT WAS JUSTIFIED AS INCIDENT TO THE SEARCH OF A MOVING VEHICLE REASONABLY BELIEVED TO BE CARRYING CONTRABAND

In any event, and without regard to the validity of his arrest, the search of respondent's person may be upheld, in the circumstances, as incident to the search of a moving vehicle reasonably believed to be carrying contraband. The undisputed facts in this case establish that the police officer, Detective Gross, and the O. P. A. investigator, O'Donnell, who accompanied him, had reason to believe that the automobile in which respondent was riding shortly before he was taken to the police station was being used to transport counterfeit ration coupons. Whatever may be the status of genuine ration coupons intended for sale contrary to law, there can be no question that counterfeit coupons are contraband in the narrow sense of that term; they are articles in the same category as narcotics, weapons, counterfeiting apparatus, etc. Hence, under the decisions of this Court, the officer had authority to stop and search the automobile. *Carroll* v. *United States,* 267 U. S. 132; *Husty* v. *United States,* 282 U. S. 694. See also *Leong Chong Wing* v. *United States,* 95 F. 2d 903 (C. C. A. 9), which involved a factual situation very similar to that presented here in

that a car was stopped and searched on probable cause to believe that it was being used as a meeting place for the sale of opium.

The validity of such a search is not dependent on the principles governing the right to arrest the occupants without a warrant. As this Court said in *Carroll* v. *United States,* 267 U. S. at 158–159:

> The right to search and the validity of the seizure are not dependent on the right to arrest. They are dependent on the reasonable cause the seizing officer has for belief that the contents of the automobile offend against the law.

In the *Carroll* case, there was no right to arrest, since the offense was only a misdemeanor. And the right to search was based on the practical circumstance that a moving vehicle could not be effectively apprehended for purposes of search if such search were required to be preceded by issuance of a warrant. That right, to search a vehicle without a warrant, persists even though the vehicle may have come to a stop a short time before the officers approach it. See *Scher* v. *United States,* 305 U. S. 251, 255, where an automobile was searched after it had entered a garage. See also *Stobble* v. *United States,* 91 F. 2d 69 (C. C. A. 7); *Earl* v. *United States,* 4 F. 2d 532 (C. C. A. 9).

Since, therefore, a search of the car would clearly have been proper, a search of the occupants of the car was, we submit, also proper under

the circumstances of this case. We have found no authority dealing specifically with the question of the right to search the occupants of a car thought to be carrrying contraband, but common sense demands that such right exist in a case such as this where the contraband sought is a small article which could easily be concealed on the person. Cf. *Harris* v. *United States, supra,* p. 7 of slip opinion. We do not suggest that where officers have information that a vehicle is being used to carry gallon jugs, they may justify a search of an individual's pockets on such ground without a valid arrest of the person. But where, as here, the contraband sought is of such a nature that it could easily be concealed on the person, could even be slipped into the pockets of a passenger in the car without his knowledge, then a right to search the automobile without a right to search the occupants of the automobile would very frequently be meaningless. Reported decisions have assumed, without discussion, that the right to stop and search an automobile includes the right to take contraband from a person in the car. See *Stobble* v. *United States,* 91 F. 2d 69, 70 (C. C. A. 7), where an envelope believed to contain heroin was taken from the defendant while she was sitting in a parked car; *Cassidy* v. *United States,* 49 F. 2d 504, 505 (App. D. C.), where a pint bottle of liquor was taken from the defendant's hip pocket at the time his car was

searched. While, in both these cases, the persons from whom the contraband was taken were subject to arrest, the taking of the articles was treated in the decisions as part of the search of the vehicle.

Considering the nature of the offending instruments sought in the instant case, we submit that the officer had the right to search the occupants of the automobile as well as the automobile itself. At the very least, we submit, the right to search the vehicle for the type of contraband here involved carried with it the right to search respondent to the extent that he was first searched at the police station when he was asked to lay his possessions on the table. It is unnecessary for the purposes of this stage of the argument to go further. Once past the present point, of course, considering the circumstances under which respondent was originally found, his production of several loose gasoline coupons with the unlikely explanation that he had found them on the street was unquestionably ample justification for his arrest and for the subsequent more thorough search of his person as incident thereto.

The fact that this search of respondent's pockets was conducted at the station house, rather than at the place where the car was parked, does not, we think, affect its validity under the foregoing principles. If there was a right to search at all, there was a right to conduct that search

in a suitable place. Thus, for example, if a motor vehicle inspector has a right to test the weight of a loaded truck, he would undoubtedly have the right to require the truck to be driven to the place where the scales are kept. See Perkins, *Law of Arrest* (1940) 25 Iowa L. Rev. 201, 207. In *Coupe* v. *United States*, 113 F. 2d 145 (App. D. C.), certiorari denied, 310 U. S. 651, officers who had reason to believe that an automobile was being used to carry policy slips took the car to police headquarters before searching it. See 113 F. 2d at page 146. Their right to do so was assumed in an opinion by Mr. Justice Rutledge.

Here, the officers had reason to suspect that the automobile was being used to carry the kind of contraband that could easily be concealed on the person of the occupants of the automobile. The automobile was, however, parked on a public street, manifestly not a place in which a search of a person's clothing can reasonably be conducted. It was, therefore, reasonable and, by the same token, proper, to take the occupants of the automobile to a place where a search of their persons could be conducted effectively.

If there was a right to search, the taking of the occupants of the car to the station house for the purpose of search did not amount to an arrest, and the validity of such action need not be judged by the rules governing the right of arrest. In this view, the search of respondent's

person at the station house was merely incident to the well recognized right to search a moving vehicle believed to be carrying contraband. And, under the principles enunciated by this Court in the *Carroll* case, the search was a reasonable one.

CONCLUSION

The action of the police officer in taking respondent to the station house and searching him after he had been found in an automobile at a place known to be the rendezvous for the transfer of contraband was reasonable under established principles governing the search of moving vehicles and the arrest of persons who have committed or who are believed to have committed a crime. The judgment of the circuit court of appeals should therefore be reversed and the judgment of the district court reinstated.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

T. VINCENT QUINN,
Assistant Attorney General.

FREDERICK BERNAYS WIENER,
Special Assistant to the Attorney General.

ROBERT S. ERDAHL,
BEATRICE ROSENBERG,
Attorneys.

AUGUST 1947.

U. S. GOVERNMENT PRINTING OFFICE: 1947

FILE COPY

Office - Supreme Court, U. S.
FILED
OCT 21 1947
CHARLES ELMORE CROPLEY

No. 61

In the Supreme Court of the United States

OCTOBER TERM, 1947

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL DI RE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

INDEX

Cases: Page

Allen v. *McCoy*, 135 Cal. App. 500 4

Byars v. *United States*, 273 U. S. 28 ..... 9, 10

Carroll v. *United States*, 267 U. S. 132 8

Cline v. *United States*, 9 F. 2d 621 7

Gambino v. *United States*, 275 U. S. 310 10

Heinzman v. *State*, 45 Okla. Crim. 305 4

Helvering v. *Stuart*, 317 U. S. 154 4

MacGregor v. *State Mutual Life Assurance Co.*, 315 U. S. 280 4

Marron v. *United States*, 275 U. S. 192 6

McNabb v. *United States*, 318 U. S. 332 8

Morton v. *State*, 190 Ga. 792 4

People v. *Marendi*, 213 N. Y. 600 ..... 3, 4

Sanderson v. *State*, 168 Ala. 109 4

Snead v. *Bonnoil*, 166 N. Y. 325 4

United States v. *Murdock*, 284 U. S. 141 8

United States v. *Park Avenue Pharmacy*, 56 F. 2d 753 ..... 5, 7

Statute.

Espionage Act, 18 U. S. C. 613 12

18 U. S. C. 53a 8

New York Code of Criminal Procedure:

Sec. 177 ..... 9, 11

Sec. 180 ..... 1, 3, 5, 11

Miscellaneous:

Federal Rules of Criminal Procedure, Rule 41 (c) 12

765142—47

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 61

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL DI RE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

I

On the argument of this cause, Mr. Justice Frankfurter raised the question, not theretofore urged or considered in the courts below or in this Court, whether the arrest of respondent was unlawful because of the failure of the arresting officer to comply with Section 180 of the New York Code of Criminal Procedure, which provides:

> When arresting a person without a warrant the officer must inform him of the authority of the officer and the cause of the arrest, except when the person arrested

is in the actual commission of a crime, or is pursued immediately after an escape.

It seems to have been assumed at the argument that the arrest in this case would have been unlawful under New York law, and that the admissibility of the evidence taken from respondent's person would depend on the question whether the validity of an arrest by a state police officer for a federal crime is governed by the statutes regulating arrest in the state where the arrest is made. It is our view, however, that the arrest of respondent under the circumstances disclosed by this record would be lawful even if its validity is to be determined by the law of New York.

In this case, the evidence discloses that, just before the arrest was made, the state officer and the O. P. A. investigators approached the car in which respondent was sitting, and saw two coupons in the hands of Reed. They asked Reed where he had obtained the coupons and he replied that he had received them from Buttita. Thereupon, the arrest was made. Under these circumstances, it was just as clear to respondent that he was being arrested for complicity in the trafficking of counterfeit coupons as if the officer had made the statement to such effect.[1] That, we

[1] We do not understand that, in any jurisdiction under any rule, an arresting officer would be required to do more than state generally the cause of arrest. Since ancient times an

submit, was sufficient compliance with the requirements of Section 180 to render the arrest lawful under either New York or federal law.

Section 180 requires that an officer making an arrest without a warrant inform the accused of his authority. But it would not be seriously contended that an arrest by a policeman in full uniform would be unlawful merely because he failed to state that he was a policeman. The purpose of Section 180 is "to acquaint the person arrested of the cause of the arrest, not only that he may know whether he is bound to submit, but also that he may know what measures to take to regain his liberty." *People* v. *Marendi*, 213 N. Y. 600, 610. That purpose was fully served by the circumstances under which this arrest was made. The respondent knew as clearly as if he had been told in meticulous detail that he was arrested for dealing in counterfeit coupons.

---

officer's power to arrest for a misdemeanor has been limited to misdemeanors committed in his presence. As the only person who committed a possible misdemeanor in the open presence of the officer was Reed, the Government informer who was holding the coupons, it is clear that the officer was arresting for a felony. Certainly, it is not necessary that an arresting officer at the time he makes an arrest cite to the person arrested chapter and verse of the Criminal Code. And certainly, also, a prosecutor's decision to proceed on a lesser offense which has come to light through legal search after a lawful arrest cannot affect the validity of the officer's reasonable belief that the person arrested had committed a felony at the time the arrest was made.

While we have found no New York cases dealing specifically with this subject,[2] decisions in other states, which impose the same requirements as those set forth in Section 180 either by statute or by judicial decision, have held that such requirements were met where the circumstances were sufficient to constitute notice to the person arrested of the authority of the arresting officer and the cause of the arrest. *Morton* v. *State*, 190 Ga. 792, 799; *Allen* v. *McCoy*, 135 Cal. App. 500, 509; *Heinzman* v. *State*, 45 Okla. Crim. 305, 308; *Sanderson* v. *State*, 168 Ala. 109, 116. That such is the rule in New York is suggested, not only by its essential reasonableness, but by the fact that, in this very case, although the circumstances of the arrest were fully developed by the testimony, no point of noncompliance with Section 180 of the Criminal Code was raised either by counsel—members of the New York bar—or by the district judge or the judges of the circuit court of appeals sitting in New York, judges to whose interpretations of state law this Court gives special weight. *Helvering* v. *Stuart*, 317 U. S. 154, 163; *MacGregor* v. *State Mutual Life Assurance Co.*, 315 U. S. 280. It is extremely significant, in our view, that Judge Learned Hand, who spoke

[2] In *People* v. *Marendi*, 213 N. Y. 600, the court noted specifically that there was no arrest but merely detention for the purpose of search without an arrest. In *Snead* v. *Bonnoil*, 166 N. Y. 325, the arresting officers did not purport to arrest the plaintiff, but stated that they wanted to examine the bag which he carried.

for the majority in the present case, did not rest the reversal upon Section 180, though he had been sitting in federal courts in New York for nearly forty years, and has won deserved acclaim as a zealous defender of civil liberties. And it is significant also that the foregoing understanding of the New York rule is confirmed by the circumstance that in *United States* v. *Park Avenue Pharmacy*, 56 F. 2d 753, 756, the Circuit Court of Appeals for the Second Circuit, in an opinion by Judge Chase which assumed that the authority of a private citizen to arrest for a federal crime was governed by the statute law of New York, upheld an arrest for conspiracy despite the fact that the opinion specifically noted that the person arrested was not told the reason for his arrest.

As a matter of fact, it is not at all clear that the arrest here does not fall within the specific exception of Section 180 dispensing with the requirement of notice when "the person arrested is in the actual commission of a crime." In our view, respondent was at the time of his arrest actually engaged in the crime of conspiracy. It is to be noted that the agreement between Buttita and Reed had been reached before Reed informed the Government agents of such fact. So the crime of conspiracy had already occurred before Reed withdrew therefrom by turning informer. If there were other persons in that conspiracy, the conspiracy was not terminated by Reed's withdrawal therefrom. *United States* v. *Park Phar-*

macy, supra. And, when respondent was brought along by a known conspirator to the place previously set for the commission of the crime contemplated by that conspiracy, it became evident that the conspiracy did in fact involve persons other than Buttita and Reed, that the conspiracy had in fact continued after Reed's secret withdrawal therefrom, and that respondent was in fact a member of that conspiracy. In view of his presence in the car which was used as a means of furthering the conspiracy to perpetrate the substantive crime contemplated by the conspiracy, we think that the officer had the right to consider the respondent as then and there being engaged in an overt act of conspiracy. This Court, in *Marron* v. *United States,* 275 U. S. 192, 198, recognized that conspiracy is a crime capable of being committed in the presence of officers.[3]

[3] For the purpose of meeting the literal requirements of Section 180, as set forth in the latter part of this argument it would, of course, be necessary to establish that respondent was actually engaged in conspiracy at the time of his arrest. But even if respondent cannot be considered as being engaged in conspiracy at the time of his arrest, in view of the discussion which occurred on the argument of this cause as to the effect of Reed's withdrawal, it seems to us worth noting that the evidence clearly shows that the crime of conspiracy had been committed before Reed's withdrawal, that there was reasonable ground to believe that the crime had continued and that respondent was implicated therein. There was thus ample justification for considering him as implicated in the felony of conspiracy, as well as in the felony of possessing and uttering counterfeit writings.

II

Assuming, however, that the arrest of respondent would have been illegal under the laws of New York if made for a crime created by the laws of New York, it does not follow, we submit, that the arrest of respondent for a federal crime would be illegal under federal law. The validity of such an arrest, must, we think, be determined by general federal principles and not by state procedure.

There is, it is true, no very clear cut decision as to just what law does govern the right to make an arrest without a warrant for a federal crime, even where the arrest is made by federal employees not specifically authorized to arrest by federal statute. There are cases in which circuit courts of appeals have assumed without discussion that the right to arrest for a federal crime in the absence of a specific federal statute conferring the power of arrest is a matter to be determined by state law. E. g., *Cline* v. *United States*, 9 F. 2d 621 (C. C. A. 9); *United States* v. *Park Avenue Pharmacy*, 56 F. 2d 753 (C. C. A. 2). The necessity for distinguishing between state and federal law has seldom arisen, since the power to arrest in most cases is the same. This case, however, may make a determination of that issue necessary.

The decisions of this Court, we think, indicate that the right to arrest without a warrant for a federal crime is a matter governed by common

law as interpreted by the federal courts rather than by state statutes. Such seems to have been the assumption of this Court's decision in *Carroll* v. *United States,* 267 U. S. 132, 156–158, even though a state officer accompanied the federal prohibition agents when the search at issue in that case was made. See 267 U. S. at 134. Such a ruling is in line with the repeated holdings of this Court that "federal criminal procedure is governed not by state practice but by federal statutes and decisions of the federal courts." *United States* v. *Murdock,* 284 U. S. 141, 150, and cases there cited. It is particularly appropriate that a federal rule be applied to the law of arrest without a warrant, since the question of the validity of such an arrest arises most frequently in connection with the question of the admissibility of evidence obtained at the time of arrest, and the determination of the admissibility of evidence is a matter peculiarly within the province of federal courts. *McNabb* v. *United States,* 318 U. S. 332, 341. That there is a federal rule of arrest seems to have been the understanding of Congress, for in 18 U. S. C. 53a, quoted at page 16 of our main brief, it embodied the federal rule enunciated in the *Carroll* case in the proviso to that section. For these reasons, we have come to the conclusion that the validity of an arrest without a warrant for a federal crime

is a matter of federal law to be determined by a uniform rule applicable in all federal courts.*

If there is a general federal rule governing arrests without a warrant, then we think it is clear that such a rule governs the action of a state officer arresting an offender for a federal crime, particularly where, as here, the state officer merely lends his aid to federal employees. The arrest of respondent in this cause was in every sense a federal undertaking. The crime was a federal crime; the information about that crime was first conveyed to federal employees, O. P. A. investigators; the arrest was made at their instigation, and the state officer merely accompanied them to assist them in making the arrest. The question at issue in this case is the lawfulness of the arrest for the purpose of determining whether a federal district court properly admitted in evidence documents tending to establish a federal offense. In all its aspects, therefore, the question here is a federal question. In *Byars* v. *United States*, 273 U S. 28, 33, this Court held that where a federal prohibition agent accompanied state officers in making a search pursuant to a state search warrant addressed to state officers, the search nevertheless had to be judged as if the

*Our examination of this problem leads us to withdraw the suggestion set forth in our main brief at pp. 15–16, that the arrest of respondent can be justified under subsection 2 of Section 177 of the New York Code of Criminal Procedure.

federal agent "had engaged in the undertaking as one exclusively his own." See also *Gambino* v. *United States*, 275 U. S. 310, where a state officer acting without federal assistance to enforce a federal crime, was nevertheless held to the standard of the federal, and not the state, courts. In this case, where the state officer was merely assisting federal employees to enforce a federal law, his acts must, we think, be judged by federal law alone.

Assuming that there was probable cause for the arrest, we know of nothing in either the federal decisions or federal statutes which would invalidate an arrest made under the circumstances of this case, if made by a private citizen exercising the power of arrest under federal criminal law. The circumstances under which respondent's arrest was made were clearly sufficient to inform him of the general nature of the crime with which he was charged. It would, indeed, be anomalous to hold that if the O. P. A. investigators had made the arrest as private citizens, the arrest would have been valid, but that it became invalid merely because it was made by a police officer who accompanied the investigators to assist them in making the arrest. We submit that if the arrest would have been lawful if made by federal officers, it was equally lawful when made by a New York state police officer accom-

panying a federal employee to enforce a federal law.[6]

It may be argued that state statutes, such as Sec. 177 of the New York Code of Criminal Procedure, define the powers of a police officer to act as such, and that where a state officer is being used as a peace officer, he has only the power conferred on him by state law. But even if that be the law, it would not follow that state statutes, such as Section 180, governing the manner of making an arrest, would be applicable to an arrest for a federal crime. Section 180 relates to procedure, not to power. We see no reason why state procedure should govern the validity of an arrest for a federal crime.

III

On the argument of this cause, in connection with the Government's alternative suggestion that the search of respondent might be sustained as incident to the search of a moving vehicle reasonably believed to be carrying contraband, Mr. Justice Jackson raised the question whether the logic of the Government's position would not authorize the search of a person who merely happened to be in a house where property was

[6] We wish to emphasize that, as stated on the argument, we do not contend that a private person has the right of search incident to an arrest. But a private person who makes an arrest is under a duty to surrender the person arrested into the custody of peace officers and a search by the peace officer would, of course, be lawful, if the original arrest was lawful.

sought pursuant to a search warrant. In response to that question, we wish to point out that Rule 41 (c) of the Federal Rules of Criminal Procedure, which in this respect merely embodies the prior provisions of the Espionage Act, 18 U. S. C. 613, specifically provides for the naming of the "person or place to be searched." Hence, except of course as incident to a lawful arrest, a person could not be searched pursuant to the search warrant unless named in the warrant. The only possible application of the principle suggested in Point II of our brief is in the case of the search of a moving vehicle reasonably believed to be carrying contraband. And as we pointed out, both in our main brief, and at the argument, we deem the right to search the person, even in such a case, to be limited to the situation where the contraband for which the search is made is of so small a nature that it could easily be concealed on the person.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

T. VINCENT QUINN,
Assistant Attorney General.

FREDERICK BERNAYS WIENER,
Special Assistant to the Attorney General.

ROBERT S. ERDAHL,
BEATRICE ROSENBERG,
Attorneys.

OCTOBER 1947.

U. S. GOVERNMENT PRINTING OFFICE: 1947

FILE COPY

No. 61.

Office - Supreme Court, U. S.
FILED
OCT 11 1947
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1947.

UNITED STATES OF AMERICA,
Petitioner,

v.

MICHAEL DiRE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT MICHAEL DiRE.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

SUBJECT INDEX.

PAGE

Question Presented 1

Additional Statutes Involved 2

Statement 3

Summary of Argument 5

Argument 6

I.

The respondent's arrest was unlawful and the subsequent searches of his person illegal 6

II.

The search of respondent's person cannot be justified as incidental to the search of Buttitta's car 17

Conclusion 20

Table of Cases.

Agnello v. United States, 269 U. S. 20 ..... 6, 8, 16

Beard v. United States, (App. D. C.) 82 Fed. 2nd 837, 844 ..... 14, 15

Bilokimsky v. Tod, 263 U. S. 149 14

Boyd v. United States, 116 U. S. 616 ..... 7, 17

Bram v. United States, 168 U. S. 532 9

Byars v. United States, 273 U. S. 28, 29 8

Carroll v. United States, 267 U. S. 132 ..... 5, 8, 9, 12, 17, 18, 19, 21

Cassidy v. United States, 49 Fed. 2nd 504 19

Dumbra v. United States, 268 U. S. 435 ..... 11, 12, 15

Gambino v. United States, 275 U. S. 310 ..... 7, 8, 10, 11

Go-Bart Importing Co. v. United States, 282 U. S. 344 .. 6

PAGE

Grace v. United States, 287 U. S. 124, 128 6
Husty v. United States, 282 U. S. 694 .....11, 12, 15, 19
Ex Parte Jackson, 96 U. S. 727 10
Marron v. United States, 275 U. S. 192 7
People v. Defore, 242 N. Y. 13, 18 .....7, 8
Stacey v. Emory, 97 U. S. 642, 645 12
Stobble v. United States, 91 Fed. 2nd 69 (C. C. A. 7) 9
Stobble v. United States (C. C. A. 7) 91 Fed. 2nd 69 .. 19
Taylor v. United States, 286 U. S. 1 10
United States v. Lefkowitz, 285 U. S. 452, 467 6
United States v. Falcone, 311 U. S. 205 16
United States v. Valenti, (C. C. A. 2) 134 Fed. 2nd 362, certiorari denied, 319 U. S. 761 14
Weeks v. United States, 232 U. S. 383, 393 .....6, 7, 8

STATUTES.

Fourth Amendment 6, 10, 16
Internal Revenue Laws 14
National Prohibition Act 11
O. P. A. Ration Order No. 5C, Sec. 1394.8301 (b); 7 F. R. 9135 4
Section 177 (2) of the New York Code of Criminal Procedure 5
Section 177 (3) of the New York Code of Criminal Procedure 5, 9
Sec. 177 of the New York Code of Criminal Procedure 7, 8
Section 1394.8178 of O. P. A. Ration Order No. 5C. .2, 4
Section 8394.8301 (b) of Ration Order No. 5C 2
Section 301 of the Second War Powers Act 2, 4

MISCELLANEOUS.

Cornelius, Search and Seizure, p. 188 10

IN THE

Supreme Court of the United States

October Term, 1947.

No. 61.

UNITED STATES OF AMERICA,
Petitioner,

v.

MICHAEL DiRE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT MICHAEL DiRE.

Question Presented

The majority opinion of the Circuit Court of Appeals (159 F. 2nd 818) correctly states the question for decision as follows. (R. 43):

> "When an officer has been informed that two persons are to deal in counterfeit documents while they are riding in a motor car, has he reasonable grounds for believing that a third person who is riding in a car along with them is a party to that transaction?"

Additional Statutes Involved.

Section 1394.8178 of O.P.A. Ration Order No. 5C, issued pursuant to Section 301 of the Second War Powers Act of 1942, provides:

"Sec. 1394.8178 MUTILATION, DESTRUCTION, OR COUNTERFEITING OF COUPON BOOKS OR CERTIFICATES. (a) No person other than a person authorized pursuant to Ration Order No. 5C shall deface, mutilate, alter, burn or otherwise destroy any coupon book or bulk, inventory or other coupons (whether or not such book was issued as a ration book and whether or not such coupon was issued as a ration or as part of a ration book) or other evidence.

(b) No person shall counterfeit or forge any coupon book, or bulk, inventory, or other coupon, or any other evidence.

(c) No person shall transfer, receive a transfer of, possess, or use any forged, altered, or counterfeited coupon book or bulk, inventory or other coupon or other evidence.

(d) Any defacement, mutilation or alteration of a coupon or ration book in violation of any provision of this section shall render such coupon or book and the coupons therein, invalid. The detachment of any coupon from a ration book, except in accordance with the provisions of Sec. 1394.8153, shall render such coupon invalid..

(e) The provisions of paragraphs (a), (c), and (d) of this section shall not be applicable to public officials acting in the performance of their official duties."

Section 8394.8301 (b) of Ration Order No. 5C provides:

"(b) Any person who wilfully performs any act prohibited, or wilfully fails to perform any act required, by any provision of Ration Order No. 5C may upon conviction be fined not more than $10,000 or imprisoned for not more than one year, or both, and shall be subject to such other penalties or action as may be prescribed by law."

Other Constitutional provisions and statutes involved are set forth in the brief for the UNITED STATES.

Statement.

On April 14, 1944, O'Donnell and Neff, O. P. A. investigators, accompanied by one Gross, a detective in the Buffalo Police Department, followed the car of one Frank Buttitta to Arkansas Street near Barton Street, in the City of Buffalo, New York (R. 4). They were acting on information furnished by one Reed, that he was going to purchase counterfeit gasoline coupons from Buttitta that afternoon (R. 15).

The officers at that time did not know who, if anyone, was in the car other than Buttitta and Reed (R. 9).

When Buttitta's car stopped and parked, the officers also stopped their car, and walked over to the Buttitta car. They saw Buttitta seated behind the wheel, the defendant DiRe seated next to him in the front seat, and Reed sitting in the rear seat, with two 100 gallon gasoline inventory coupons in his hand (R. 5, 9). Asked where he got the coupons, Reed said he got them from Buttitta (R. 5, 9, 15).

Although the officers had no knowledge at that time that DiRe had any coupons, genuine or counterfeit, on his person (R. 10), he was arrested (R. 5, 10) and subjected to a preliminary search of his person, at the car (R. 9, 15). This search revealed no coupons. DiRe was not told the reason for his arrest (R. 10).

The three men were then taken to Police Headquarters (R. 10, 15), where the defendant DiRe was again searched, and directed to empty his pockets (R. 6). This search resulted in the finding of two 100 gallon inventory coupons,

one A coupon, one C coupon and a number of fuel oil coupons (R. 6, 13).

DiRe was then locked up for about two hours, then searched a third time (R. 7, 14). This search revealed an envelope containing 100 additional coupons concealed under DiRe's shirt (R. 7, 14). No charge had as yet been placed against the defendant (R. 14); nor was any charge placed until the next morning, after he had been locked up all night (R. 14).

The fuel oil coupons, as well as the A and C gasoline ration coupons found upon the defendant, were conceded by the Government to be genuine (R. 17, 25). The two 100 gallon inventory coupons disclosed by the second search, when DiRe emptied his pockets, as well as the 100 coupons in the envelope, disclosed by the third search, were later determind to be counterfeit (R. 15, 24, 25).

The defendant was thereafter charged with illegal possession of counterfeit gasoline ration coupons in violation of Sec. 1394.8178 of Ration Order No. 5C, issued by the Office of Price Administration, in violation of Sec. 301 of the Second War Powers Act of 1942 (R. 3). The offense is a misdemeanor, the maximum penalty for violation thereof being one year imprisonment or a fine of $10,000.00, or both (O. P. A. Ration Order No. 5C, Sec. 1394.8301 (b); 7 F. R. 9135).

The facts of defendant's trial, conviction, sentence, appeal and the reversal by the Circuit Court of Appeals are sufficiently set forth in the brief for the United States, and we deem it unnecessary to repeat them here.

Summary of Argument.

1. The defendant's arrest was invalid, and the subsequent search of his person violated the Fourth Amendment.

The mere presence of the defendant in Buttitta's car at the time of the pre-arranged transfer of the two coupons from Buttitta to Reed did not constitute probable cause for the arrest and search of the defendant.

(a) The defendant's arrest and search cannot be justified under Section 177 (2) of the New York Code of Criminal Procedure, giving a peace officer the right to arrest without a warrant:

> "2. When the person arrested has committed a felony, although not in his presence."

The subsequent discovery of the counterfeit coupons concealed on the defendant's person cannot justify an illegal arrest and search, even though the search discloses the commission of a felony.

(b) Even though it be conceded *arguendo* that Buttitta and Reed were engaged in the commission of a conspiracy, a felony under Federal Law, the officers did not have reasonable cause for believing the respondent DiRe to have been engaged in the conspiracy. Hence the search cannot be justified under Sec. 177 (3) of the New York Code of Criminal Procedure, which authorizes an arrest without a warrant:

> "3. When a felony has in fact been committed, and he has reasonable cause for believing the person to be arrested to have committed it."

2. The searches of defendant's person cannot be justified as an incident to the search of Buttitta's car. The doctrine of *Carroll* v. *United States*, 267 U. S. 132, cannot

be extended by implication to destroy the right of security in his person, which the Fourth Amendment gives to the defendant.

ARGUMENT.

I.

The respondent's arrest was unlawful and the subsequent searches of his person illegal.

This Court has consistently held that the Fourth Amendment and legislation regulating searches and seizures should be liberally construed in the individual's favor, to prevent impairment of the protection extended by the Constitutional Amendment (*Go-Bart Importing Co.* v. *United States*, 282 U. S. 344; *Grace* v. *United States*, 278 U. S. 124, 128).

"An arrest may not be used as a pretext to search for evidence." (*United States* v. *Lefkowitz*, 285 U. S. 452, 467, citing *Go-Bart Importing Co.* v. *United States*, 282 N. S. 344.)

The language of *Weeks* v. *United States*, 232 U. S. 383, 393, although it dealt with the right to search the defendant's home rather than his person, applies with equal force to a search of the person incident to an arrest:

> "The efforts of the Courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those gerat principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land."

The right to search the defendant's person can only exist as an incident to a valid arrest (*Agnello* v. *United States*,

269 U. S. 20; *Marron* v. *United States*, 275 U. S. 192; *Gambino* v. *United States*, 275 U. S. 310; *Weeks* v. *United States*, 232 U. S. 383).

Exploratory or general searches, not incidental to a lawful arrest, and not based on probable cause, violate the prohibition of the Fourth Amendment, and evidence seized as the result of such searches will be suppressed (*Boyd* v. *United States*, 116 U. S. 616; *Weeks v. United States*, 232 U. S. 382; *Marron* v. *United States*, 275 U. S. 192).

A

Counsel for the United States attempts to justify the search of the defendant's person as an incident to a lawful arrest, under the second subdivision of Sec. 177 of the New York Code of Criminal Procedure "because, being in possession of counterfeit ration coupons, he had in fact committed a felony, though not in the presence of the officer." (p. 8, *Government's brief.*)

This argument is in direct contradiction to the long-established rule of the Federal Court that an arrest not based upon probable cause cannot be subsequently justified by the discovery of evidence showing the commission of a felony by the person searched.

Had DiRe been arrested, searched and prosecuted for crime in New York State, the coupons seized from his person would nevertheless be competent evidence, against him; and the original arrest, even though illegal, could be justified by the fruits of the search. (*People* v. *Defore*, 242 N. Y. 13, 18.)

The Federal Courts, however, have never allowed the end result to justify the means used to obtain it. The discovery of incriminating coupons upon the respondent's per-

son cannot be used as a basis to justify the original arrest, if there was no probable cause for the arrest and search of the defendant's person in the first place. (*Gambino v. United States*, 275 U. S. 310; *Agnello v. United States*, 269 U. S. 20; *Weeks v. United States*, 232 U. S. 383);

"A search prosecuted in violation of the Constitution is not made lawful by what it brings to light": (*Byars v. United States*, 273 U. S. 28, 29.)

We believe the Court below to have properly ruled that, assuming that Officer Gross had authority to arrest all three occupants of the car under Sec. 177 of the New York Code of Criminal Procedure, his authority to arrest DiRe must be found, not under subdivision 2, but under subdivision 3; " * * * that is, Gross must have had reasonable grounds for thinking that DiRe was a party to the conspiracy of Buttitta and Reed, which was in process of execution before his eyes." (*Majority Opinion Below*, R. 42.)

DiRe was never charged with conspiracy or with any felony. The offense for which he was indicted and convicted was a misdemeanor (R. 3). Neither under Federal law nor under the law of New York State would the officers have any right to arrest DiRe for a misdemeanor not committed in their presence, without a warrant (Sec. 177 *New York State Code of Criminal Procedure; People v. DeFore*, 242 N. Y. 13; *Carroll v. United States*, 267 U. S. 132).

There was no waiver by the defendant of his immunity to illegal search, nor any consent thereto. When he disgorged the contents of his pockets at Police Headquarters, it was no voluntary act, but under the direction and compulsion of the Police officer. The same is true of the second search at Police Headquarters, after he had been detained two hours, which disclosed the presence of the one hundred 100-gallon inventory coupons underneath his shirt. Such

submission to search under compulsion of the law's authority is not a waiver or consent *(Bram v. United States,* 168 U. S. 532).

B.

The officers' right to search the defendant's person as an incident to his arrest must therefore be justified, if at all, by the existence of probable cause for his arrest at the time of said arrest. The officers must have had reasonable cause to believe that DiRe had committed a felony, when they saw him sitting in Buttitta's car.

An officer "may arrest without a warrant when believed by the officer upon reasonable cause to have been guilty of a felony". *(Carroll v. United States,* 267 U. S. 132, 156.) The test of reasonable or probable cause must here be applied, whether or not the right of the officer to arrest the respondent is found in Sec. 177 (3) of the New York Code of Criminal Procedure, or the above stated Federal rule as set forth in *Carroll v. United States.* In either event, the rule is the same.

When the officers followed Buttitta's car it was in the knowledge that Buttitta was illegally to transfer gasoline ration coupons to Reed. Their purpose was to arrest Buttitta. They had no knowledge or information concerning DiRe, and did not even know that he was in the car. When the officers walked over to Buttitta's parked car, Reed, sitting in the back seat, had the two coupons in his hand. When asked where he got them, he told the officers that Buttitta had given them to him.

Buttitta's crime was then complete. The officers seized the evidence which was in Reed's hand, in plain sight. *(Stobble v. United States,* 91 Fed. 2nd. 69 (C. C. A. 7)).

Mere suspicion will not justify a search and seizure, whether it be of the person or of a building. In *Taylor v. United States,* 286 U. S. 1, this Court held that the odor of alcohol seeping from a garage, and the presence in the garage of piles of cardboard cases, visible through a window, did not justify the search and seizure of whiskey later found within the garage, without a search warrant.

In *Ex Parte Jackson,* 96 U. S. 727, this Court held that letters in transit in the United States mail are not subject to search and seizure without a search warrant; and that the individual's rights under the Fourth Amendment extend to papers closed against inspection wherever they may be.

"It would seem that the Constitutional guarantees of the Fourth Amendment would apply with more force to the person than to papers, houses and effects, and so the Courts have held." *(Cornelius, Search and Seizure,* p. 188.)

In *Gambino v. United States,* 275 U. S. 310, the defendant Gambino and another were arrested by New York State Troopers while travelling from Canada in the defendant Gambino's car. While no detailed statement of the facts is given in the opinion, the arrest and search of the defendant's car would appear to have been based merely upon a suspicion, later proved well grounded, that there was liquor in the car. The officers' belief was apparently based upon the appearance of the defendants, the fact that they were coming from Canada, and the previous experience of the State Troopers in similar searches of bootleggers' cars in that vicinity.

A search of the car revealed a quantity of intoxicating liquor, and the defendants were indicted and convicted of conspiracy to import and transport liquor in violation of

the National Prohibition Act. This Court reversed the conviction on the ground that the arrest of the defendants and the search of the defendant Gambino's car was not based on probable cause, and therefore illegal. With respect to the question presented in the present case, the following language of the Court in the *Gambino* case is significant (p. 312):

> "Their automobile *(while occupied by Gambino and therefore within the protection accorded to his person)* was searched without a warrant; and intoxicating liquor found therein was seized." (Italics ours.)

Counsel for the government contends that the majority decision below erred in misapplying the rule of substantive guilt, to the effect that mere knowledge of a conspiracy is not sufficient to establish guilt as a conspirator, in determining the validity of the respondent's arrest (pp. 9, 19, *Government's Brief*). The Government contends that mere proof that DiRe was present in Buttitta's car at the time of the transfer of the coupons from Buttitta's car to Reed afforded the officers probable cause for DiRe's arrest and subsequent search.

In support of this contention, the government relies upon the decisions of this Court in *Husty v. United States*, 282 U. S. 694, and *Dumbra v. United States*, 268 U. S. 435.

The government contends further that the fact that proof of association with known conspirators, proof of knowledge of the conspiracy, and proof of presence at the time of the commission of an overt act is competent evidence upon trial of an indictment for conspiracy, makes the mere presence of DiRe in Buttitta's car at the time of the illegal transaction between Buttitta and Reed sufficient and reasonable cause for the officers' believing DiRe to have been engaged in the commission of a felony, to wit, the conspiracy.

In *Dumbra v. United States*, 268 U. S. 435, the question was whether or not the affidavits of prohibition agents presented sufficient grounds for a search warrant. The affidavits showed that the defendant had a permit to manufacture non-beverage wine at certain premises, and that he operated a grocery store next door; that an agent had purchased wine from a son of the defendant on two different occasions at the grocery store. The Court held that these facts established probable cause, and affirmed an order denying a motion to quash a search warrant. In defining probable cause, the Court quoted with approval its previous decision in *Carroll v. United States*, 267 U. S. 132, 161:

> "If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed, it is sufficient."

In *Stacey v. Emory*, 97 U. S. 642, 645, this Court defined probable cause as "reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the party is guilty of the offense with which he is charged".

We submit that neither the *Dumbra* nor the *Husty* decisions are authority against our contention that the mere presence of the respondent DiRe in Buttitta's automobile at the time of the transfer of the coupons from Buttitta to Reed did not constitute probable cause for his arrest and search.

In *Husty v. United States*, 282 U. S. 694, this Court followed its rule previously laid down in the *Carroll* and Dumbra cases that the search of an automobile for liquor was justified where the officer had reasonable cause to believe that the car contained contraband liquor. The Court there held that a prohibition agent, who had known the defendant Husty to be a bootlegger for several years, and who had received information from a hitherto reliable in-

formant that the defendant Husty would be transporting liquor in his car at a certain time and place; and who, upon approaching the defendant's car, saw the defendant's two companions flee from the car, had probable cause to arrest the defendant and search his car.

The government argues that, inasmuch as proof of association with known conspirators, knowledge of a conspiracy, and presence at the time of the commission of an overt act, is competent as proof of participation in a conspiracy, (p. 19-20, *Government's brief*), the "concurrence of all these factors at a particular time and place" (p. 20) constituted probable cause for the arrest and search of the respondent.

This argument is a mere repetition, in different language, of the contention that the mere prosence of DiRe in Buttitta's car at the time of the arrest constituted probable cause for his arrest and search. The only proof of "association with known conspirators" is proof of DiRe's presence in the car. The only proof of "knowledge of the conspiracy" is DiRe's presence in the car.

We submit that DiRe's presence in the car is not necessarily proof of knowledge on his part of the existence of a conspiracy. DiRe was sitting in the front seat, and Reed in the back seat. There is no proof that there was any conversation in the car between Buttitta and Reed, preliminary to the passing of the counterfeit coupons from Buttitta to Reed. Buttitta may have simply reached back and handed the coupons to Reed. Arrangements for the transfer, and even payment therefor by Reed, may very well have been made by Buttitta and Reed long before DiRe entered the automobile. The coupons were small enough that Buttitta could have handed them back to Reed

without DiRe's ever knowing what passed from Buttitta to Reed. For all we can gather from the record, Buttitta may have handed Reed the coupons before DiRe entered the car.

The only proof in the case is that when the officers came up to Buttitta's car, Reed was sitting in the back seat, with the two coupons in his hand. There is no proof that DiRe was even looking in Reed's direction. There is certainly no evidence in the case sufficient to warrant the inference that DiRe had any prior knowledge of a conspiracy between Buttitta and Reed, much less any reasonable ground for a legitimate belief that DiRe was a participant in the transaction.

The facts of the present case are far removed from the hypothetical case of the bank robber's guest, cited in the government's brief, (p. 22), or the case of "men found at midnight at a blockade still in full operation, located in the depths of a swamp", *(Beard v. United States,* (App. D. C.) 82 Fed. 2nd. 837, 844, referring to the facts in *Bilokumsky v. Tod,* 263 U. S. 149).

In *United States v. Valenti,* (C. C. A. 2) 134 Fed. 2nd 362, certiorari denied, 319 U. S. 761, cited by the government in support of its contention, the Circuit Court of Appeals affirmed the defendant's conviction for conspiracy to violate the Internal Revenue Laws relating to stills and intoxicating liquors. The question before the Court was the sufficiency of the evidence of conspiracy. No question of search or seizure was presented. In that case many overt acts of conspiracy on the part of the defendant and others over a six year period were shown. There was proof that other defendants had been connected with numerous other illicit distilleries; that the defendant received numerous phone calls from other defendants; that the defendant was

related to several other conspirators; that the cars and trucks of other conspirators were on many occasions parked at the defendant's home and garage, and that the defendant's car was frequently parked with other conspirators' cars over a period of several years.

In *Beard v. United States,* 82 Fed. 2nd. 837 (App. D. C.) certiorari denied 298 U. S. 655, the defendant Beard and twelve others were convicted of conspiracy to operate a gambling room, and the substantive offense of operation of a gambling room. There was evidence of a central gambling establishment in one building, with subsidiaries in the business section of the City of Washington. One defendant paid the rent, and the defendant Beard admitted owning much of the personal property in the gambling room. Others of the appellants were frequently seen going to and coming from the gambling room. There was evidence of slips, a switchboard, and eleven telephone lines in the room. All of the appellants were charged with the commission of one or more overt acts in furtherance of the conspiracy. At the time of the raid, the telephones were ringing, bets were being transmitted, and all of the appellants were sitting in the room in their shirt sleeves, with their coats hanging in an outer room.

In none of the cases cited by the government in support of its contention that DiRe's mere presence in the Buttitta car afforded probable cause for his arrest and search, was there any search of the person of the defendant.

The *Husty* case *(supra)* involved the search of a car, and the *Dumbra* case *(supra)* involved the search of premises.

The government's contention would require this Court to hold that every passenger in an automobile, no matter

how innocent, is subject to arrest and search by Federal officers, merely upon proof of commission of crime in the car by other occupants.

We do not believe that this Court is prepared to so far relax its vigilance in upholding the protection afforded the citizen by the Fourth Amendment, or to that extent destroy "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures * * *". (*Fourth Amendment*).

In *Agnello v. United States*, 269 U. S. 20, the defendant was arrested and charged with conspiracy to violate the Harrison Narcotic Law. Upon his arrest, a search of his person revealed cocaine. The agents went further, and searched the defendant's home, several blocks away, finding more cocaine, which was introduced in evidence.

This Court reversed the conviction, holding that the right of search of the defendant's person, as an incident to a lawful arrest, does not extend to the defendant's home, without a search warrant.

In arguing for the affirmance of the conviction in the *Agnello* case, counsel for the government made the following argument (summary of government's argument, p. 25, *Agnello v. United States, supra*):

> "Sanctity of the home is no greater than sanctity of the person. *Indeed, the immunity of the person from arbitrary arrest is more highly prized than the immunity of the home from arbitrary search.*" (Italics ours.)

In *United States v. Falcone* (311 U. S. 205) this Court held that one who sells materials knowing that they are intended for use, or will be used, in the production of illegal liquor, but not knowing of a conspiracy to commit the

crime, was not chargeable as a co-conspirator. (See discussion in opinion of Court below, R. 43).

We further submit that no distinction can be made with respect to the respondent's immunity from unreasonable search of his person because of the fact that the object of the search was contraband, rather than legitimate personal papers or records. (*Boyd v. United States*, 116 U. S. 616).

The right to search DiRe's *person* was entirely dependent on the right to arrest. The validity of the search and seizure in no way depended on the nature of the property seized.

II.

The search of respondent's person cannot be justified as incidental to the search of Buttitta's car.

In *Carroll* v. *United States*, 267 U. S. 132, 158, this Court held that the right to search an automobile for contraband liquor was not dependent on the right to arrest the driver, but was solely dependent on whether or not the officer had reasonable to cause to believe that the automobile contained the contraband liquor. The government now seeks to extend the rule of the *Carroll* case by implication to permit search of all occupants of the car as part of the search of the car itself. (p. 26, *Government's brief.)*

The Court's decision in the *Carroll* case traced at some length the history of the various Federal Statutes relative to seizure of contraband goods in transit, as opposed to contraband goods located in a building, pointing out that the reason for its distinction between the necessity for a

search warrant in the case of a building and in that of an automobile lies in the fact that it would not be practicable to secure a search warrant for the vehicle, because it can be quickly moved out of the jurisdiction in which the warrant must be sought. (p. 153.)

The Court further pointed out (p. 158):

> "The right to search and the validity of the seizure are not dependent on the right to arrest. They are dependent on the reasonable cause the seizing officer has for belief that the contents of the automobile offend against the law."

The Court further pointed out that "the seizure in such a proceeding comes before the arrest * * *" (p. 159).

If we are to extend the rule of the *Carroll* case to authorize the search of passengers in the car as part of the search of the car itself, the reason for the rule must logically demand its application to every pedestrian on the street. A pedestrian, suspected of carrying contraband, can flee the jurisdiction just as effectively as any vehicle.

In the *Carroll* case, the agents had no right to arrest the defendant, since the offense committed was a misdemeanor. Would it not therefore be just as logical to apply the rule of the *Carroll* case to the pedestrian, and allow a suspicious Federal officer, with reasonable cause to believe that the pedestrian was carrying contraband, to first stop him, search him, seize the contraband and then arrest him for the misdemeanor of possession?

The law of the Carroll case is not sufficiently elastic to reach the point to which the government here seeks to stretch it. The government's contention puts the respondent DiRe in exactly the same category as the upholstery or compartments of Buttitta's car.

We do not believe that this Court is prepared to hold that a citizen waives the personal protection of the Fourth Amendment every time he steps into an automobile.

In *Stobble v. United States* (C. C. A. 7) 91 Fed. 2nd 69, cited by the government in support of its argument, Federal narcotic agents, armed with previous information, followed the defendant to her own car, and known to the agents to be her own car, carrying two small envelopes of the same size and color in which heroin was ordinarily carried. Upon approaching the car, the agents saw the two small envelopes lying in plain view on the defendant's lap, in the car.

In *Cassidy v. United States*, 49 Fed. 2nd 504, also cited by the government on this point, prohibition agents, armed with knowledge of previous convictions of the defendant for bootlegging, and having previously observed him removing upholstery from his car, followed the defendant to a point where he stopped his car, and saw him take a pint bottle from the car and put it in his hip pocket.

Counsel for the government concedes that in both the *Stobble* and *Cassidy* cases, the persons from whom the contraband was taken were legally arrested (p. 28, *government's brief*). Nevertheless, it is argued, the seizure of the contraband was treated in each case by the Court as a part of the search of the vehicle.

Conceding this point for argument's sake, the all-important distinction between the cited cases and the present case is that in the *Husty, Stobble* and *Cassidy* cases, the person searched and arrested was the owner of the car, not a mere passenger. We will further concede, for the sake of argument, the right of the officers in the present case to arrest Buttitta, the known owner of the car, either as an incident to his arrest for possession and transporta-

tion of the two coupons found in Reed's hand, or based on probable cause justifying a search of his car under the rule of the *Carroll* case. We submit that neither of the three above cited cases is authority for the further extension of the right of search to a passenger in Buttitta's car.

Counsel for the government further contends that the right to search the defendant's person, as a necessary incident to the search of the automobile itself, included the right to take the respondent to Police Headquarters, several miles away, because "the taking of the occupants of the car to the station house for the purpose of search *did not amount to an arrest*, and the validity of such action need not be judged by the rules governing the right of arrest." (p. 29, *government's brief;* italics ours.) This assertion ignores the undisputed fact that the respondent was in fact placed under arrest at the car (R. 5, 10), and had already been subjected to a preliminary search of his person at the car, which revealed no coupons (R. 9, 15). We submit that the officers' right to search the person of the respondent must be governed by what actually occurred, not by a hypothetical situation in which the officers merely escorted the respondent to the station house for the purpose of search prior to arrest (p. 29, *government's brief*).

Conclusion.

The incriminating coupons were taken from the respondent by means of an illegal search, not based on a valid arrest. The mere presence of DiRe as a passenger in Buttitta's car at the time the two counterfeit coupons were found in Reed's hand, did not constitute probable cause for DiRe's arrest.

Nor can the doctrine of *Carroll* v. *United States* be extended to authorize the search of the respondent's person, independent of the right to arrest, as a part of the search of Buttitta's car. The government's attempt to thus whittle away the protection afforded the citizen with respect to his person, by the Fourth Amendment, should not be sanctioned.

In the words of the Court below (R. 44):

> "If the prosecution of crime is to be conducted with so little regard for that protection which centuries of English law have given to the individual, we are indeed at the dawn of a new era; and much that we have deemed vital to our liberty, is a delusion."

Respectfully submitted,

JOHN F. CONNELLY,
CHARLES J. McDONOUGH,
Attorneys for Respondent.

Dated: October 8, 1947.

0.5

SUPREME COURT OF THE UNITED STATES

No. 61.—October Term, 1947.

The United States of America, Petitioner, v. Michael Di Re.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[January 5, 1948.]

Mr. Justice Jackson delivered the opinion of the Court.

Michael Di Re was convicted on a charge of knowingly possessing counterfeit gasoline ration coupons in violation of § 301 of the Second War Powers Act, 1942.[1] The decisive evidence was that obtained by search of his person, after he was arrested without a warrant of any kind. The Circuit Court of Appeals, Second Circuit, considered that any question as to the timeliness of his objection to this evidence was eliminated by its disposition on its merits by the District Court, and, one judge dissenting, it held both his search and arrest to have been illegal. The Government was granted certiorari,[2] raising no question other than the correctness of the holding by the Court of Appeals that the evidence was the fruit of an illegal arrest and search.

An investigator of the Office of Price Administration was informed by one Reed that he was to buy counterfeit gasoline ration coupons from a certain Buttitta at a named place in the City of Buffalo, New York. The investigator and a detective from the Buffalo Police Department trailed Buttitta's car and finally came upon it parked at the appointed place. They went to the car and found the informer Reed, the only occupant of the rear seat, holding

[1] 50 U. S. C. App. Supp. V. § 633.
[2] —. U. S. —.

in his hand two gasoline ration coupons which later proved to be counterfeit. Reed, on being asked, said he obtained them from Buttitta, who was sitting in the driver's seat. Beside Buttitta sat Di Re. All three were taken into custody, "frisked" to make sure they had no weapons and were then taken to the police station. Here Di Re complied with a direction to put the contents of his pockets on a table. Two gasoline and several fuel oil ration coupons were laid out. He said he had found them in the street. About two hours later, after questioning, he was "booked" and thoroughly searched. One hundred inventory gasoline ration coupons were found in an envelope concealed between his shirt and underwear. These, as well as the gasoline coupons earlier disclosed, proved to be counterfeit. Their introduction as evidence, over the objection of the defendant, was held by the court below to require reversal of the conviction.[1]

I.

The Government now defends the search upon alternative grounds: 1, that search of Di Re was justified as incident to a lawful arrest; 2, that search of his person was justified as incident to search of a vehicle reasonably believed to be carrying contraband. We consider the second ground first.

The claim is that officers have the right, without a warrant, to search any car which they have reasonable cause to believe carries contraband, and incidentally may search any occupant of such car when the contraband sought is of a character that might be concealed on the person. This contention calls, first, for a determination as to whether the circumstances gave a right to search this car.

The belief that an automobile is more vulnerable to search without warrant than is other property has its

[1] 159 F. 2d 818.

source in the decision of *Carroll* v. *United States*, 267 U. S. 132. That search was made and its validity was upheld under the search and seizure provisions enacted for enforcement of the National Prohibition Act and of that Act alone. Transportation of liquor in violation of that Act subjected first the liquor, and then the vehicle in which it was found, to seizure and confiscation, and the person "in charge thereof" to arrest.[4] The Court reviewed the legislative history of enforcement legislation and concluded (at p. 147), "The intent of Congress to make a distinction between the necessity for a search warrant in the searching of private dwellings and in that of automobiles and other road vehicles in[5] the enforcement of the Prohibition Act is thus clearly established by the legislative history of the Stanley Amendment. Is such a distinction consistent with the Fourth Amendment? We think that it is. The Fourth Amendment does not denounce all searches or seizures, but only such as are unreasonable."

---

[4] Section 26, Title II of the National Prohibition Act provided in part as follows: "When . . . any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof . . . ." In the *Carroll* case it was said (267 U. S. at 155) that this section was intended "to reach and destroy the forbidden liquor in transportation and the provision for forfeiture of the vehicle and the arrest of the transporter were incidental"; and (267 U. S. at 158) "the right to search and the validity of the seizure are not dependent on the right to arrest. They are dependent on the reasonable cause the seizing officer has for belief that the contents of the automobile offend against the law. The seizure in such a proceeding comes before the arrest as Section 26 indicates . . . ."

[5] This word "in" is erroneously printed "is" in the case as reported.

The progeny of the *Carroll* case likewise dealt with searches and seizures under this Act. *Husty* v. *United States*, 282 U. S. 694.

Obviously the Court should be reluctant to decide that a search thus authorized by Congress was unreasonable and that the Act was therefore unconstitutional. In view of the strong presumption of constitutionality due to an Act of Congress, especially when it turns on what is "reasonable," the *Carroll* decision falls short of establishing a doctrine that, without such legislation, automobiles nonetheless are subject to search without warrant in enforcement of all federal statutes. This Court has never yet said so. The most that can be said is that some of the language by which the Court justified the search and seizure legislation in the *Carroll* case might be used to make a distinction between what is a reasonable search as applied to an automobile and as applied to a residence or fixed premises, even in absence of legislation.

We need not decide whether, without such Congressional authorization as was found controlling in the *Carroll* case, any automobile is subject to search without warrant on reasonable cause to believe it contains contraband. In the case before us there appears to have been no search of the car itself. No one on the spot seems to have thought there was cause for searching it, or that it was subject to forfeiture. The nature of ration tickets, the contraband involved, was not such that a car would be necessary or advantageous in carrying them except as an incident of carrying the person. When the question of admissibility of this evidence arose in the trial court, counsel for the Government made no claim that there had been search or cause for search of the car. No question of fact concerning such a claim has been resolved by the trial court or the jury.

Assuming, however, without deciding, that there was reasonable cause for searching the car, did it confer an

incidental right to search Di Re? It is admitted by the Government that there is no authority to that effect, either in the statute or in precedent decision of this Court, but we are asked to extend the assumed right of car search to include the person of occupants because "common sense demands that such rights exist in a case such as this where the contraband sought is a small article which could easily be concealed on the person."

This argument points up the different relation of automobile to the crime in the *Carroll* case than in the one before us. An automobile, as was there pointed out, was an almost indispensable instrumentality in large-scale violation of the National Prohibition Act, and the car itself therefore was treated somewhat as an offender and became contraband. But even the National Prohibition Act did not direct the arrest of all occupants but only of the person in charge of the offending vehicle, though there is better reason to assume that no passenger in a car loaded with liquor would remain innocent of knowledge of the car's cargo than to assume that a passenger must know what pieces of paper are carried in the pockets of the driver.

The Government says it would not contend that, armed with a search warrant for a residence only, it could search all persons found in it. But an occupant of a house could be used to conceal this contraband on his person quite as readily as can an occupant of a car. Necessity, an argument advanced in support of this search, would seem as strong a reason for searching guests of a house for which a search warrant had issued as for search of guests in a car for which none had been issued. By a parity of reasoning with that on which the Government disclaims the right to search occupants of a house, we suppose the Government would not contend that if it had a valid search warrant for the car only it could search the occupants as an incident to its execution. How then could

we say that the right to search a car without a warrant confers greater latitude to search occupants than a search by warrant would permit?

We see no ground for expanding the ruling in the *Carroll* case to justify this arrest and search as incident to the search of a car. We are not convinced that a person, by mere presence in a suspected car, loses immunities from search of his person to which he would otherwise be entitled.

II.

The other ground on which the Government defended the search of Di Re, and the only one on which it relied at the trial, is that the officers justifiably arrested him and that this conferred a right to search his person. If he was lawfully arrested, it is not questioned that the ensuing search was permissible. Hence we must examine the circumstances and the law of arrest.

Some members of this Court rest their conclusion that the arrest was invalid on § 180 of the New York Code of Criminal Procedure which requires an officer making an arrest without a warrant to inform the suspect of the cause of arrest, except when it is made during commission of the crime or when in pursuit after an escape.* This question was first raised from the Bench during argument in this Court. Di Re did not assert this ground of invalidity at the trial. Had he done so the Government might have met it with proof of circumstances which in themselves would show that Di Re had been effectively informed,

* Section 180 provides:

"When arresting a person without a warrant the officer must inform him of the authority of the officer and the cause of the arrest, except when the person arrested is in the actual commission of a crime, or is pursued immediately after an escape."

See also *People* v. *Marendi*, 213 N. Y. 600, 610. Cf. *John Bad Elk* v. *United States*, 177 U. S. 529; *Christie* v. *Leachinsky* (1947) 1 All Eng. 567.

even if the circumstances fell short of establishing the statutory exception. The proceedings below did not develop the facts concerning Di Re's arrest in connection with this requirement. Inasmuch as the issue would lead to exploration of the law as to waiver when the defense was not raised in either court below, or indeed by the petition here, and as to applicability of the statute if, as the Government contends, lack of express declaration was unnecessary because circumstances supplied the required information, we do not undertake to determine on this record whether Di Re's arrest satisfied this provision of the New York law.

The arrest was challenged in the courts below on the ground that it violated another provision of New York law which was considered to be controlling on the subject. The court below assumed that the arresting officer, a state officer, derived his authority to arrest Buttitta and Reed, although it was for a federal crime, from § 177 of the New York Code of Criminal Procedure, and also considered the legality of the arrest of Di Re under paragraph 3 thereof.[1] In this Court the Government originally argued that the arrest was authorized under both paragraphs 2 and 3 of the State law, but in a supplemental brief the Government withdraws the suggestion "that the arrest of respondent can be justified under subsection 2 of section 177 of the New York Code of Criminal Procedure." Instead, it now urges that "the validity of an arrest without a warrant for a federal crime is a matter of federal law to be determined by a uniform rule applicable in all federal courts."

---

[1] Section 177 of the New York Code of Criminal Procedure provides: "A peace officer may, without a warrant, arrest a person,

1. For a crime, committed or attempted in his presence;

2. When the person arrested has committed a felony, although not in his presence;

3. When a felony has in fact been committed, and he has reasonable cause for believing the person to be arrested to have committed it."

We believe, however, that in absence of an applicable federal statute the law of the state where an arrest without warrant takes place determines its validity. By one of the earliest acts of Congress, the principle of which is still retained, the arrest by judicial process for a federal offense must be "agreeably to the usual mode of process against offenders in such state."[8] There is no reason to believe that state law is not an equally appropriate standard by which to test arrests without warrant, except in those cases where Congress has enacted a federal rule. Indeed the enactment of a federal rule in some specific cases seems to imply the absence of any general federal law of arrest.

Turning to the Acts of Congress to find a rule for arrest without warrant, we find none which controls such a case as we have here and none that purports to create a general rule on the subject. If we were to try to find or fashion a federal rule for arrest without warrant, it appears that the federal legislative materials are meager, inconsistent and inconclusive. Federal Bureau of Investigation officers are authorized only "to make arrests without warrant for felonies which have been committed and which are cognizable under the laws of the United States, in cases where the person making the arrest has reasonable grounds to believe that the person so arrested is guilty of such felony and where there is a likelihood of the person

[8] The Act of September 24, 1789 (Ch. 20, § 33, 1 Stat. 91), concerning arrest with warrant, provided: "That for any crime or offence against the United States, the offender may, by any justice or judge of the United States, or by any justice of the peace, or other magistrate of any of the United States where he may be found agreeably to the usual mode of process against offenders in such state, and at the expense of the United States, be arrested, and imprisoned or bailed, as the case may be, for trial before such court of the United States as by this act has cognizance of the offense." This provision has remained substantially similar to this day. 18 U. S. C. § 591. See also 1 Ops. Atty. Gen. 85, 86.

escaping before a warrant can be obtained for his arrest, but the person arrested shall be immediately taken before a committing officer."[9] However, marshals and their deputies "shall have the power to make arrests without warrant for any offense against the laws of the United States committed in their presence or for any felony cognizable under the laws of the United States in cases where such felony has in fact been or is being committed and they have reasonable grounds to believe that the person to be arrested has committed or is committing it,"[10] and they are also given the same powers as sheriffs in the same state may have, by law, in executing the laws thereof.[11]

In denouncing unlawful search by federal officers as a misdemeanor, Congress provided that it should not apply to one "arresting or attempting to arrest any person committing or attempting to commit an offense in the presence of such officer, agent or employee, or who has committed, or who is suspected on reasonable grounds of having committed a felony."[12] Thus the legislative sources, while yielding some common provisions, also contain many inconsistencies. No act of Congress lays down a general federal rule for arrest without warrant for federal offenses. None purports to supersede state law. And none applies to this arrest which, while for a federal offense, was made by a state officer accompanied by federal officers who had no power of arrest. Therefore the New York statute provides the standard by which this arrest must stand or fall.

Since, under that law, any valid arrest of Di Re, if for a misdemeanor must be for one committed in the arresting officer's presence, and if for a felony must be for one which the officer had reasonable grounds to believe the suspect

[9] 48 Stat. 1008, 49 Stat. 77, 5 U. S. C. § 300 (a).
[10] 49 Stat. 378, 28 U. S. C. § 504 (a).
[11] 1 Stat. 425, 12 Stat. 282, 28 U. S. C. § 504.
[12] 49 Stat. 877, 18 U. S. C. § 53 (a).

had committed, we seek to learn for what offense this man was taken into custody. The arresting officer testified that he did not tell Di Re what he was being arrested for. After he was taken to the station he was "booked," but the record does not show upon what charge. He was later indicted for the misdemeanor of knowingly possessing counterfeit gasoline ration coupons in violation of Ration Order No. 5 (c) of the Office of Price Administrator. But on appeal the Government suggested the arrest may be defended as one for a felony because probable grounds existed for believing him guilty of the felony of conspiracy under § 37 of the Criminal Code,[13] and in this Court for the first time it suggests that there were grounds for arrest on a charge of possessing a known counterfeit writing with intent to utter it as true for the purpose of defrauding the United States, a felony under § 28 of the Criminal Code.[14]

Assuming, without deciding, that an arrest without a warrant on a charge not communicated at the time may later be justified if the arresting officer's knowledge gave probable grounds to believe any felony found in the statute books had been committed, we are brought to the inquiry whether the circumstances at that time afforded such grounds.

The Government now concedes that the only person who committed a possible misdemeanor in the open presence of the officer was Reed, the Government informer who was found visibly possessing the coupons. Of course, as to Buttitta they had previous information that he was to sell such coupons to Reed, and Reed gave information that he had done so. But the officer had no such information as to Di Re. All they had was his presence, and if his presence was not enough to make a case for arrest for a misdemeanor, it is hard to see how it was

[13] 18 U. S. C. § 88.
[14] 18 U. S. C. § 72.

enough for the felony of violating § 28 of the Criminal Code.

The relevant difference between Ration Order 5 (c) and § 28 of the Criminal Code is that the former declares mere possession of a counterfeit coupon an offense, while the latter defines a felony which consists not merely of possession but also of knowledge of the instrument's counterfeit character, and also of intent to utter it as true. It is admitted that at the time of the arrest the officers had no information implicating Di Re and no information pointing to possession of any coupons, unless his presence in the car warranted that inference. Of course they had no information hinting further at the knowledge and intent required as elements of the felony under the statute.

III.

The Government's defense of the arrest relies most heavily on the conspiracy ground. In view of Reed's character as an informer, it is questionable whether a conspiracy is shown. But if the presence of Di Re in the car did not authorize an inference of participation in the Buttitta-Reed sale, it fails to support the inference of any felony at all.

There is no evidence that it is a fact or that the officers had any information indicating that Di Re was in the car when Reed obtained ration coupons from Buttitta, and none that he heard or took part in any conversation on the subject. Reed, the informer, certainly knew it if any part of his transaction was in Di Re's presence. But he was not called as a witness by the Government, nor shown to be unavailable, and we must assume that his testimony would not have been helpful in bringing guilty knowledge home to Di Re.

An inference of participation in conspiracy does not seem to be sustained by the facts peculiar to this case. The argument that one who "accompanies a criminal to a

crime rendezvous" cannot be assumed to be a bystander, forceful enough in some circumstances, is farfetched when the meeting is not secretive or in a suspicious hide-out but in broad daylight, in plain sight of passersby, in a public street of a large city, and where the alleged substantive crime is one which does not necessarily involve any act visibly criminal. If Di Re had witnessed the passing of papers from hand to hand, it would not follow that he knew they were ration coupons, and if he saw that they were ration coupons, it would not follow that he would know them to be counterfeit. Indeed it appeared at the trial to require an expert to establish that fact. Presumptions of guilt are not lightly to be indulged from mere meetings.

Moreover, whatever suspicion might result from Di Re's mere presence seems diminished, if not destroyed, when Reed, present as the informer, pointed out Buttitta, and Buttitta only, as a guilty party. No reason appears to doubt that Reed willingly would involve Di Re if the nature of the transaction permitted. Yet he did not incriminate Di Re. Any inference that everyone on the scene of a crime is a party to it must disappear if the Government informer singles out the guilty person.

IV.

The Government also makes, and several times repeats, an argument to the effect that the officers could infer probable cause from the fact that Di Re did not protest his arrest, did not at once assert his innocence, and silently accepted the command to go along to the police station. One has an undoubted right to resist an unlawful arrest, and courts will uphold the right of resistance in proper cases. But courts will hardly penalize failure to display a spirit of resistance or to hold futile debates on legal issues in the public highway with an officer of the law. A

layman may not find it expedient to hazard resistance on his own judgment of the law at a time when he cannot know what information, correct or incorrect, the officers may be acting upon. It is likely to end in fruitless and unseemly controversy in a public street, if not in an additional charge of resisting an officer. If the officers believed they had probable cause for his arrest on a felony charge, it is not to be supposed that they would have been dissuaded by his profession of innocence.

It is the right of one placed under arrest to submit to custody and to reserve his defenses for the neutral tribunals erected by the law for the purpose of judging his case. An inference of probable cause from a failure to engage in discussion of the merits of the charge with arresting officers is unwarranted. Probable cause cannot be found from submissiveness, and the presumption of innocence is not lost or impaired by neglect to argue with a policeman. It is the officer's responsibility to know what he is arresting for, and why, and one in the unhappy plight of being taken into custody is not required to test the legality of the arrest before the officer who is making it.

The Government's last resort in support of the arrest is to reason from the fruits of the search to the conclusion that the officer's knowledge at the time gave them grounds for it. We have had frequent occasion to point out that a search is not to be made legal by what it turns up.[15] In law it is good or bad when it starts and does not change character from its success.

V.

We meet in this case, as in many, the appeal to necessity. It is said that if such arrests and searches cannot be made, law enforcement will be more difficult and uncertain. But the forefathers, after consulting the les-

[15] See, for example, *Byars* v. *United States*, 273 U. S. 28, 29.

sons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment. Taking the law as it has been given to us, this arrest and search were beyond the lawful authority of those who executed them. The conviction based on evidence so obtained cannot stand.

Affirmed.

THE CHIEF JUSTICE and MR. JUSTICE BLACK dissent.